THE INTERNATIONAL ARBITRATION REVIEW

TENTH EDITION

Editor
James H Carter

THE LAWREVIEWS

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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 often debates 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 2019

Chapter 46

UNITED STATES

James H Carter and Sabrina Lee[1]

I INTRODUCTION

Amid significant political uncertainty in the United States, with legislation and rules upended in some legal fields, international arbitration law has remained untouched. The future of international investment arbitration, including the US's role in treaty regimes, is uncertain but as yet unchanged. Meanwhile, the US Supreme Court and other courts continue to add clarifications and refinements to international arbitration law, including with respect to class action arbitrations and enforcement of awards. US law continues to be strongly supportive of the arbitral process.

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 almost 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

1 James H Carter is senior counsel and Sabrina Lee is counsel at Wilmer Cutler Pickering Hale and Dorr LLP.

2 9 USC Section 2.

3 9 USC Section 3.

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.

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

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).

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).

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 limited relevance to international arbitration.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Arbitrability

This year saw a key opinion from the Supreme Court on whether the court or the arbitrator decides gateway issues of arbitrability. Under *First Options of Chicago, Inc v. Kaplan*, if the parties have 'clearly and unmistakably' allocated the question of arbitrability to the arbitrators, then those issues are for the arbitrator to decide in the first instance, not the courts.[11] Since then, the circuit courts have been split over whether there is an exception to the *First Options* rule if the claim of arbitrability is wholly groundless.[12]

The Supreme Court resolved that circuit split this year in *Henry Schein Inc v. Archer & White Sales Inc*,[13] holding that there is no wholly groundless exception. The Court reasoned that the parties may agree to have an arbitrator decide gateway questions of arbitrability, and when the parties' contract does so, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.[14]

However, the Court declined to decide whether the contract at issue in *Henry Schein* in fact delegated the arbitrability question to the arbitrator, choosing instead to remand that issue to the Fifth Circuit.[15] This was a key omission, because the arbitration agreement at issue provided that the dispute shall be resolved under the American Arbitration Association (AAA) arbitration rules, and those rules provide that arbitrators have the power to resolve arbitrability questions.[16] The courts have been split over whether references to arbitration rules with such competence-competence provisions were sufficient to satisfy the *First Option*s standard, and some commentators had hoped that the Supreme Court's decision in *Henry Schein* would resolve that dispute.[17] This, however, the Supreme Court declined to do, leaving the issue to be resolved in a future decision.

11 514 US 938 (1995). See also *Howsam v. Dean Witter Reynolds, Inc*, 537 US 79, 83 (2002).

12 The Fourth, Fifth, Sixth and Federal Circuits had adopted the wholly groundless doctrine. See, e.g., *Simply Wireless, Inc v. T-Mobile US, Inc*, 877 F3d 522, 528-29 (4th Cir 2017); *Douglas v. Regions Bank*, 757 F3d 460, 464 (5th Cir 2014); *Turi v. Main Street Adoption Servs, LLP*, 633 F3d 496, 511 (6th Cir 2011); *Qualcomm Inc v. Nokia Corp*, 466 F3d 1366, 1371 (Fed Cir 2006). The doctrine was rejected by the Tenth and Eleventh Circuits. See *Belnap v. Iasis Healthcare*, 844 F3d 1272, 1286-87 (10th Cir 2017); *Jones v. Waffle House, Inc*, 866 F3d 1257, 1268-71 (11th Cir 2017).

13 139 S Ct 524 (2019).

14 Id. at 526.

15 Id. at 531.

16 Id. at 528.

17 See, e.g., Brief of Amicus Curiae Professor George A Bermann in Support of Respondent, *Henry Schein v. Archer & White Sales, Inc* (No. 17-1272, 25 September 2018) (arguing that the incorporation of arbitration rules granting power to the arbitrators to decide arbitrability does not satisfy the *First Options* test).

Class arbitration

The issue of who decides arbitrability questions also was considered in the context of class arbitrations. Prior to this past year, four circuits (the Sixth, Third, Fourth and Eighth Circuits) had held that the availability of class arbitration is a fundamental question of arbitrability that is presumptively for a court to decide.[18] This year, three more circuits addressed the issue.

In *Herrington v. Waterstone Mortgage Corp*, the Seventh Circuit concluded that the availability of class arbitration is a gateway issue of arbitrability because it involves foundational questions of with whom the parties agreed to arbitrate and whether the agreement to arbitrate covers a particular controversy.[19] The court also focused on the fundamental differences between class and bilateral arbitration, noting that in class arbitration, the arbitrator resolves disputes between hundreds of parties and adjudicates the rights of absent parties, and the process is slower and more costly than bilateral arbitration, so many of the advantages of arbitration are lost. Meanwhile, loss of appellate review is particularly significant to a defendant in a class arbitration because the stakes are higher.[20]

Similarly, the Eleventh Circuit in *JPay, Inc v. Kobel* also found that the availability of class arbitration is a 'gateway question that determines what type of proceeding will determine the parties' rights and obligations' and that, due to the substantial differences between bilateral and class arbitration, 'it [is] likely that contracting parties would expect a court to decide whether they will arbitrate bilaterally or on a class basis'.[21] Nonetheless, the court decided that the question should be decided by the arbitrator in that case because the agreement's multiple references to the AAA arbitration rules showed that the parties had clearly and unmistakably decided to delegate the arbitrability question to the arbitrator.[22]

The Eleventh Circuit reached the same conclusion in *Spirit Airlines v. Maizes*,[23] finding that references to the AAA arbitration rules (which include supplementary rules empowering an arbitrator to decide whether a class action is permitted) constitute clear and unmistakable evidence that the parties intended to delegate the issue of class arbitration to the arbitrator. The Tenth Circuit also reached the same conclusion in *Dish Network v. Ray*.[24]

An issue relating to class arbitration examined by the Supreme Court this year was whether arbitration agreements requiring individual rather than class arbitration proceedings are enforceable. In the employment context, provisions of this type arguably violate the National Labor Relations Act (NLRA), which prohibits employers from interfering with employees' exercise of their rights to engage in concerted activities.

In *Epic Systems v. Lewis*,[25] the Supreme Court held that such arbitration clauses are enforceable and not barred by the FAA's savings clause, which allows courts to refuse to enforce arbitration agreements on the basis of generally applicable contract defences. The Court held that the savings clause does not allow courts to refuse to enforce arbitration agreements on the basis of defences specifically targeting arbitration, and challenging an

18 See *Reed Elsevier, Inc v. Crockett*, 734 F3d 594, 598-99 (6th Cir 2013); *Opalinski v. Robert Half Int'l, Inc*, 761 F3d 326, 333-35 (3d Cir 2014); *Catamaran Corp v. Towncrest Pharmacy*, 864 F3d 966, 971–72 (8th Cir 2017); *Del Webb Communities, Inc v. Carlson*, 817 F3d 867, 874–77 (4th Cir 2016).

19 907 F3d 502, 508 (7th Cir 2018).

20 Id. at 509-10.

21 904 F3d 923, 935-36 (11th Cir 2018).

22 Id. at 936-37.

23 899 F3d 1230 (11th Cir 2018).

24 900 F3d 1240, 1245-46 (10th Cir 2018).

25 138 S Ct 1612 (2018).

arbitration clause because it requires individualised arbitration is precisely that.[26] The Court also found that enforcement of the arbitration clause does not violate the NLRA because the NLRA does not guarantee employees the right to engage in class or collective actions; nor is there any indication in the NLRA of any intent to displace the FAA.[27] Finally, the Court rejected the argument that the ruling of the National Labor Relations Board (NLRB) that the NLRA nullified the FAA in cases like these should be afforded deference, reasoning that the NLRB's decision not only interpreted the NLRA but also limited the application of the FAA, which it did not have the authority to do.[28]

The Supreme Court issued another decision adverse to class arbitration in *Lamps Plus, Inc v. Varela*.[29] The arbitration agreement in that case provided that 'arbitration shall be in lieu of any and all lawsuits or other civil proceedings.'[30] The Court held that this was an ambiguous agreement and therefore cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration as required by *Stolt-Nielsen SA v. AnimalFeeds International Corp*.[31] The Court emphasised that class arbitration is markedly different from and undermines important benefits of the individual arbitration contemplated by the FAA and reasoned that, because of these differences, the FAA requires more than ambiguity to ensure that the parties actually agreed to class arbitration.

The Ninth Circuit's contrary conclusion was based on the state law *contra proferentum* doctrine, which provides that contractual ambiguities should be construed against the drafter. The Supreme Court held that the doctrine is based on public policy considerations and is not rooted in the intent of the parties. Accordingly, relying on the *contra proferentum* doctrine would be contrary to the foundational principle that arbitration is a matter of consent. The Court concluded that it did not matter that the *contra proferentum* rule treated arbitration agreements and other contracts equally, because such equal treatment cannot save from pre-emption general rules 'that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration".[32]

FAA Section 1 exemption

As noted above, the FAA provides that 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'.[33] However, Section 1 of the FAA contains an exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce'.[34]

One interesting question in today's gig economy is whether independent contractors in the transportation industry, such as Uber or Lyft drivers, fall within the scope of this exemption. The Supreme Court answered this question in *New Prime v. Oliveira*,[35] a case

26 Id. at 1622-23.

27 Id. at 1625.

28 Id. at 1629-30.

29 *Lamps Plus, Inc v. Varela*, 587 US ___ (2019).

30 *Varela v. Lamps Plus, Inc*, 701 F Appx 670, 672 (9th Cir 2017), cert granted sub nom. *Lamps Plus, Inc v. Varela*, 138 S Ct 1697 (2018).

31 *Varela*, 701 F Appx at 672-73.

32 *Epic Systems Corp v. Lewis*, 584 US ___ (2019).

33 9 USC Section 2.

34 Id., Section 1.

35 139 S Ct 532 (2019).

involving a truck driver who worked as an independent contractor. The driver's contract with his employer specified that the truck driver was 'deemed for all purposes to be an independent contractor, not an employee of Prime'.[36] The contract also contained an arbitration clause that provided for arbitration of 'any disputes arising out of or relating to the relationship created by the agreement, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties.'[37] The truck driver filed a class action lawsuit against his employer, but the employer moved to compel the truck driver to arbitrate the dispute.

First, the Supreme Court held that it was for the court, not the arbitrator, to determine whether the Section 1 exemption applies because, to invoke its statutory powers under Sections 3 and 4 of the FAA to stay litigation and compel arbitration, a court must first know whether the contract itself falls within or beyond the boundaries of Sections 1 and 2. The Court thought the fact that the arbitration agreement clearly delegated arbitrability questions to the arbitrator was irrelevant, because the existence of such language does not mean the FAA authorises a court to stay litigation and compel arbitration.[38]

Next, the Court concluded that this dispute fell within the Section 1 exemption because contracts of employment include any agreement to perform work, whether that work is performed by an independent contractor or an employee, because that was the ordinary meaning of contracts of employment at the time the FAA was enacted in 1925.[39]

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, with interesting cases relating to Venezuela, arbitrator bias and the public policy exception under the New York Convention.

As reported in last year's edition, in the *Crystallex International Corp v. Petróleos de Venezuela SA* arbitration,[40] Crystallex, a Canadian mining company, brought claims against Venezuela pursuant to the Venezuela–Canada bilateral investment treaty (BIT) alleging that Venezuela had unlawfully expropriated its investment in a gold mining operation in Venezuela and otherwise violated protections under the Venezuela–Canada BIT. In 2016, the ICSID Tribunal awarded US$1.2 billion to Crystallex.

The District of Columbia district court confirmed the award in March 2017,[41] and the DC circuit affirmed in February 2019.[42] The circuit court rejected Venezuela's claim that the district court overlooked its arguments that the arbitral award should be vacated under the FAA, noting that the district court had repeatedly cited the very motion to vacate that Venezuela complains was overlooked.[43] The court also held that the district court properly reviewed the arbitrator's calculation of damages under a deferential standard, rather than *de novo*. The calculation of damages raised questions of arbitrability, and the court held that the

36 *Oliveira v. New Prime, Inc*, 857 F3d 7, 10 (1st Cir 2017).

37 *Oliveira v. New Prime, Inc*, 141 F Supp 3d 125, 128 (D Mass 2015).

38 139 S Ct at 537-38.

39 Id. at 539-40.

40 See *Crystallex Int'l Corp v. Petróleos de Venezuela, SA*, 879 F3d 79 (3d Cir 2018).

41 *Crystallex Int'l Corp v. Bolivarian Republic of Venezuela*, 244 F Supp 3d 100 (DDC 2017).

42 *Crystallex Int'l Corp v. Bolivarian Republic of Venezuela*, No. 17-7068, 2019 WL 668270 (DC Cir 14 February 2019).

43 Id. at *1.

district court did not err in deferring to the arbitral panel because the parties had consented to arbitration under the ICSID rules, and had therefore agreed to authorise the arbitrator to decide arbitrability.[44]

Separately, while the battle over confirmation was ongoing, Crystallex proceeded to seek enforcement of the award against Venezuelan state-owned assets in the United States. In August 2018, the district court in Delaware issued an order allowing Crystallex to attach common stock owned by Petroleos de Venezula SA (PDVSA), a state-owned oil enterprise.[45] The court first held that it had jurisdiction over the matter, noting that it was undisputed that the court had jurisdiction over Venezuela under the arbitration exception in the Foreign Sovereign Immunities Act (FSIA). The court held that it did not need a separate, independent basis for jurisdiction with respect to PDVSA, which was not involved in the underlying arbitration, because Crystallex was not seeking to impose any obligation on PDVSA to pay Venezuela's judgment; rather, it was seeking to attach property nominally belonging to PDVSA that truly belonged to Venezuela.[46]

The court then found that PDVSA was not shielded by sovereign immunity under the FSIA because it is Venezuela's alter ego and thus falls within the FSIA arbitration exception. The court noted evidence showing that Venezuela extensively controlled PDVSA, including evidence that Venezuela:

a used PDVSA's assets as its own;
b ignored PDVSA's separate legal status in public statements;
c exerted control over PDVSA's directors and officers;
d dictated PDVSA's business decisions, such as designating oil production levels and the price of oil; and
e used PDVSA to achieve domestic and foreign policy goals that had nothing to do with its business.[47]

Finally, the court addressed whether PDVSA was entitled to immunity from attachment and execution under the FSIA. Under Section 1610(a)(6) of the FSIA, property in the United States of a foreign state is not immune from attachment and execution if it is used for a commercial activity in the United States. The court held that PDVSA uses its shares for a commercial activity because, through them, PDVSA manages its ownership of PDV Holding Inc (a Delaware corporation) and its wholly-owned subsidiary, CITGO (another Delaware corporation). This management includes the use of shares to appoint directors, approve contracts and pledge assets as security for PDVSA's debt.[48] The court rejected the argument that the stock was not being used for a commercial activity because US sanctions against Venezuela had 'effectively frozen' them, reasoning that once Venezuela used property in commerce, it is presumed that the use of the property for a commercial activity is continuing, in the absence of evidence to the contrary.[49]

44 Id. at *2.
45 *Crystallex Int'l Corp v. Bolivarian Republic of Venezuela*, 333 F Supp 3d 380 (D Del 2018).
46 Id. at 392.
47 Id. at 406-11.
48 Id. at 417.
49 Id. at 419.

The case is now on appeal before the Third Circuit. Venezuela has argued, among other things, that because of the new US sanctions imposed on PDVSA in January 2019, PDVSA's assets cannot be used for a commercial activity in the United States and are thus immune from attachment under the FSIA.[50]

Similar arguments have been made by another judgment creditor of Venezuela, glassmaker Owens-Illinois. Owens-Illinois won an ICSID award against Venezuela relating to Venezuela's seizure of two glass container factories. In February 2019, Owens-Illinois filed a petition in Delaware district court seeking to enforce the award against PDVSA and CITGO, along with other related companies.[51] Just as Crystallex had done before it, Owens-Illinois argued that PDVSA and CITGO are alter egos of Venezuela. As of the time of publication, the decision is still pending.

This year also saw an interesting case involving the public policy exception under the New York Convention. In *Hardy Exploration & Production v. India*,[52] the federal court in the District of Columbia declined on public policy grounds to confirm a portion of an award ordering the Indian government to allow Hardy Exploration to continue to appraise a petroleum block for an additional three years. The court held that enforcement of this specific performance order against a sovereign state would violate the US public policy interest in respecting the right of other nations to control the extraction and processing of natural resources within their sovereign territories.[53] The court found that the United States' policy preference of respecting the sovereignty of foreign states and against specific performance is evidenced by the fact that the FSIA granted the federal courts jurisdiction over claims against foreign countries seeking compensatory damages, but only allowed for domestic methods of ensuring that plaintiffs receive those damages and did not make any mention of specific performance or extraterritorial enforcement.[54] The court also noted that if it confirmed the award, the opposite situation could come to pass, which would be untenable – that is, the US has not waived its sovereign immunity in its own courts against specific performance, so it would not be in compliance with US public policy to create a situation in which a foreign court could order the US to specifically perform its portion of a contract.[55]

There were also several interesting cases this year on vacatur due to arbitrator bias. In *Argentina v. AWG Group*,[56] the DC Circuit addressed whether there was evident partiality because one of the panel members briefly sat on the board of directors of UBS bank, which had investments in two of the parties, Suez and Vivendi. The court found there was no basis for vacating on evident partiality grounds, relying on a concurring opinion by Justice White of the US Supreme Court in *Commonwealth Coatings Corp v. Continental Casualty Co* in which Justice White concluded that 'arbitrators are not automatically disqualified by a business relationship with the parties before them . . . if they are unaware of the facts but the relationship is trivial'.[57] Applying this rule, the DC Circuit concluded that the arbitrator's

50 Reply Brief for Intervenor-Appellant at 25-26, *Crystallex Int'l Corp v. Bolivarian Republic of Venezuela*, Nos. 18-2797, 18-3124 (3d Cir 6 February 2019).

51 *OI European Group BV v. Bolivarian Republic of Venezuela*, No. 1:19-cv-00920-LPS (D Del 11 February 2019).

52 314 F Supp 3d 95 (DDC 2018).

53 Id. at 110.

54 Id. at 113-14.

55 Id. at 114.

56 894 F3d 327 (DC Cir 2018).

57 894 F3d at 334 (citing *Commonwealth Coatings Corp v. Continental Casualty Co*, 393 US 145, 150 (1968)).

interest in Suez and Vivendi was trivial, noting that UBS was a passive shareholder in Suez and Vivendi with no management responsibilities and no guarantee of directly sharing in their profits and that UBS's investments in Suez and Vivendi made up less than 0.06 per cent of the US$3.6 trillion UBS had in invested assets, which is too small to suggest much significance.[58]

The Second Circuit also considered the issue of arbitrator bias in *Lloyds v. Florida*.[59] The Department of Financial Services of the State of Florida was acting as a receiver for the Insurance Company of the Americas (ICA), which had won a US$1.5 million award against Lloyds in a reinsurance dispute. The lower court vacated the award for evident partiality, because ICA's party-appointed arbitrator had failed to disclose close relationships with former and current directors and employees of ICA.

The Second Circuit found that the district court erred in applying a reasonable person standard, which is the standard governing neutral arbitrators, and joined the Eighth, Sixth and Eleventh Circuits in holding that the standards for neutral arbitrators 'do not extend to party-appointed arbitrators.'[60] Instead, the Second Circuit held that a party seeking to vacate on evident partiality grounds 'must sustain a higher burden to prove evident partiality' on the part of a party-appointed arbitrator and remanded to the lower court for reconsideration under the proper standard.[61] In making this holding, the court appeared to apply standards that might be considered unique to reinsurance arbitrations under US domestic law.

The court further noted that despite this higher standard, 'a party-appointed arbitrator is still subject to some baseline limits to partiality' – for example, an undisclosed relationship between a party and its party-appointed arbitrator may constitute evident partiality if the relationship violates the arbitration agreement. Here, the contract required that the arbitrator be disinterested, a standard that would be breached if the party-appointed arbitrator had a personal or financial stake in the outcome of the arbitration.[62] The court also observed that '[i]n the absence of a clear showing that an undisclosed relationship (or the non-disclosure itself) influenced the arbitral proceedings or infected an otherwise-valid award, that award should not be set aside even if a reasonable person (or court) could speculate or infer bias'.[63]

Complaints about arbitrator bias were also raised in *Vantage Deepwater Co v. Petrobras America Inc*.[64] In September 2018, Petrobras moved to vacate on evident partiality grounds, arguing that the arbitrator showed bias against the oil company during a hearing, including by making 'snide' comments under his breath while Petrobras' lawyers were questioning witnesses.[65] The court held there was no evident partiality and confirmed the award, noting that 'absent some sort of overt misconduct, a disappointed party's perception of rudeness on the part of an arbitrator is not the sort of 'evident partiality' contemplated by the [FAA] as

58 894 F3d at 335-37.

59 *Certain Underwriting Members of Lloyds of London v. Florida*, 892 F3d 501 (2d Cir 2018).

60 Id. at 509 (citation omitted).

61 Id. at 503-4.

62 Id. at 510.

63 Id.

64 No. 4:18-cv-02246 (SD Tex).

65 See Respondents' Motion to Vacate Majority Award, No. 4:18-cv-02246 (SD Tex 27 September 2018), ECF No. 53.

grounds for vacating an award'.[66] The court also rejected the argument that the arbitrator had engaged in 'partisan behavior' by aggressively cross-examining a key witness, holding that this did not amount to evident partiality.[67]

There were also a handful of cases in which parties argued that awards were unenforceable because they had been invalidated (at least in part) by a second panel. In *Diag Human SE v. Czech Republic*, Diag Human, a blood plasma company, had obtained an award against the Czech Republic for approximately US$400 million in damages. Czech arbitration law permits parties to agree to a review process in which a second arbitral panel can revisit the original award and uphold, nullify or modify it. The arbitration agreement permitted a party to request a review of any arbitral award within 30 days of receipt. The Czech Republic requested such a review, and the second arbitral panel declined to confirm the award and instead issued a resolution ending the proceedings.

Diag Human sought to confirm the award in federal court in the District of Columbia, but the court refused. The DC Circuit affirmed the lower court's decision, noting that the arbitration agreement precluded the award from entering into legal effect because it specified that the award would only go into effect '[i]f the review application of the other party has not been submitted within the deadline'.[68] It further noted that the resolution set out multiple grounds for invalidating the award, and that Czech arbitration law provides that an arbitral award is judicially enforceable, while a resolution ends the proceedings.[69]

In *Teco Guatemala Holdings LLC v. Guatemala*,[70] the DC district court rejected Guatemala's argument that a partial annulment rendered the entire award unenforceable. Guatemala had filed a motion to dismiss, arguing that the court should only look at the dispositif (but not the reasoning) of the award when deciding whether to enforce the award, and that because the ICSID annulment committee had annulled the tribunal's award of damages and interest, there was nothing left from the original award to enforce. The court rejected both arguments, holding that it is not unusual for courts to look at the reasoning to understand the disposition and, in any case, the dispositif only annulled the portions of the award that failed to grant Teco the additional relief that it sought; it did not annul everything.[71]

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 brought 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],

66 2019 WL 2161037 at *5 (SD Tex 17 May 2019).

67 Id. at *6.

68 907 F3d 606, 609 (DC Cir 2018).

69 Id. at 610-11.

70 No. 17-102 (RDM), 2018 WL 4705794 (DDC 30 September 2018).

71 Id. at *5-6.

are not subject, in the federal courts, to judicial review for error in interpretation'.[72] Over the following years, 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.[73] 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.*[74]

While this criticism of manifest disregard is itself merely dicta, the Court was clearly sceptical about a merits-based review that threatened to turn arbitration into a mere prelude to a 'more cumbersome and time-consuming judicial review process'.[75] It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived *Hall Street*.[76]

As a result of the Supreme Court's lack of clear direction, a circuit split has arisen over the continuing validity 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.[77] The Second and Ninth Circuits (which include New York and California), meanwhile, have held that manifest

72 *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).

73 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).

74 *Hall Street Assocs, LLC v. Mattel, Inc*, 552 US 576, 585 (2008). See also Gary Born, *International Commercial Arbitration* 1,125–1,207 (second edition 2014), discussing Stolt-Nielson SA and manifest disregard under the FAA.

75 Hall Street, 552 US at 588 (quoting *Kyocera Corp v. Prudential-Bache Trade Servs, Inc*, 341 F3d 987, 998 (9th Cir 2003)).

76 See *Stolt-Nielsen SA*, 559 US at 672 n3.

77 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'.); *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 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 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*, No. 4:10MC00763, 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'.).

disregard is simply a judicial gloss on the FAA's statutory grounds for vacatur and have continued to apply their manifest disregard jurisprudence.[78] Both circuits have found that a high standard must be met for the doctrine to apply.[79] The Fourth Circuit has ruled that the manifest disregard doctrine is still viable,[80] while the Seventh Circuit has 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)'.[81] The Sixth Circuit 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'.[82] Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence.[83] 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.[84]

In 2018, two courts in New York continued to recognise that manifest disregard may be valid grounds for vacatur in New York but declined to vacate on those grounds. In *Daesang v. Nutrasweet Co*,[85] as discussed in last year's edition, in 2017 a New York state lower court vacated a US$100 million arbitration award against NutraSweet, finding that the tribunal had manifestly disregarded the law by misapplying New York law on fraudulent misrepresentation

78 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).

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

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

81 *Johnson Controls, Inc v. Edman Controls, Inc*, 712 F3d 1021, 1026 (7th Cir 2013) (citation omitted).

82 *Physicians Ins Capital v. Praesidium Alliance Grp*, 562 F Appx 421, 423 (6th Cir 2014) (citation omitted). The Sixth Circuit noted that manifest disregard is a 'limited review'. Id. (citations and quotation marks omitted):

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.

83 For the First Circuit, compare *Ramos-Santiago v. United Parcel Services*, 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 Argentina 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), rev'd sub nom. *BG Grp PLC v. Republic of Argentina*, 572 US 25 (2014); *Paul Green Sch of Rock Music Franchising, LLC v. Smith*, 389 F Appx 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 Appx 186 (10th Cir 2009) (no need to decide whether manifest disregard survives *Hall Street* because petitioners have not demonstrated it).

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

85 167 AD3d 1 (1st Dep't 2018).

and by finding that Nutrasweet had waived its counterclaims.[86] This decision was the first in New York to apply the manifest disregard doctrine to vacate an international arbitration award.

However, in September 2018, a New York appeals court reversed. It first noted that a very high standard is required to establish manifest disregard; namely, that the arbitrator knew of the governing legal principle yet refused to apply it, and the law ignored by the arbitrators was well-defined, explicit and clearly applicable to the case.[87] The court concluded this standard was not met because the arbitrator had applied and analysed the case law on misrepresentation, and the law was not sufficiently well-defined to give rise to a manifest disregard claim.[88] The court further held that the lower court had erred in holding, 'based on its own careful reading of the transcript', that the arbitral tribunal had misinterpreted the procedural history of the arbitration in finding that Nutrasweet had waived its breach of contract counterclaim. The court emphasised that '[a] court is not empowered by the FAA to review the arbitrators' procedural findings, any more than it is empowered to review the arbitrators' determinations of law or fact', and that those procedural findings should be judged by a highly deferential standard.[89]

Similarly, in *KT Corp v. ABS Holdings, Ltd*,[90] KT Corp moved to vacate an award, arguing, inter alia, that the panel had acted in manifest disregard of the law by failing to recognise mandatory Korean law and disregarding New York law concerning transfer of title and illegal contracts. A federal court in New York articulated the same two-part standard as the court in Daesang, holding that the arbitral panel did not ignore Korean law, and an order issued by a Korean ministry was not a governing legal principle because it could not be applied retroactively; and the order was not clearly applicable to the case, because it did not exist (nor was it even contemplated) when the events relating to the dispute occurred. The court thus concluded that there was no manifest disregard of the law.

In addition to the manifest disregard doctrine, some courts in the Third and Ninth Circuits have found that an award may be vacated if the arbitrator exceeded his or her powers by issuing a decision that was completely irrational.[91] This ground for vacatur is rarely successfully invoked, but this year saw one such rare example. In *Aspic Engineering & Construction Co v. ECC Centom Constructors LLC*,[92] the Ninth Circuit vacated an arbitration award because the arbitrator's finding that Aspic Engineering did not have to comply with the federal acquisition regulations (FAR) was irrational. The arbitrator had found that the subcontracts at issue contained provisions obligating Aspic to comply with the FAR but nonetheless concluded that it was unreasonable to expect Aspic, an Afghan company that was less than sophisticated, to comply with these regulations. The Ninth Circuit held that the arbitrator exceeded his authority and the award was irrational because it 'disregarded specific provisions of the plain text [of the subcontracts at issue] in an effort to prevent what the

86 No. 655019/2016, 2017 NY Misc LEXIS 1810 (Sup Ct, NY County, 15 May 2017).

87 167 AD3d at 15-16.

88 Id. at 19.

89 Id. at 22.

90 No. 17 Civ 7859 (LGS), 2018 WL 3435405 (SDNY 12 July 2018), appeal filed (2d Cir 7 August 2018).

91 See, e.g., *Kyocera Corp v. Prudential-Bache Trade Servs, Inc*, 341 F3d 987, 997 (9th Cir 2003); *PMA Capital Ins Co v. Platinum Underwriters Bermuda, Ltd*, 400 F Appx 654, 656 (3d Cir 2010); *Sutter v. Oxford Health Plans LLC*, 675 F3d 215, 219-20 (3d Cir 2012).

92 913 F3d 1162 (9th Cir 2019).

arbitrator deemed an unfair result'.[93] The court further noted that neither party had argued that the FAR provisions did not apply (indeed, both parties had devoted significant portions of their briefs to arguing that the other party had failed to comply with the FAR).

Arbitrator functus officio

The doctrine of *functus officio* provides that once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those matters ends and they have no further authority to redetermine those issues absent agreement of the parties.

In *American International Specialty Lines Insurance Co (AISLIC) v. Allied Capital Corp*,[94] a New York appeals court found that an arbitral panel had exceeded its authority, based on the doctrine of *functus officio*, when it reconsidered a final liability award it had rendered previously. The parties had agreed that the panel would issue an immediate determination on liability and then convene a separate evidentiary hearing on damages. The panel issued a partial final award finding that, inter alia, the US$10.1 million that Allied paid to settle another litigation did not amount to a loss under certain policies, and thus AISLIC did not have to indemnify Allied for that amount. Allied requested reconsideration of the partial final award, arguing that the majority of the panel erred in finding that Allied did not suffer a loss under certain policies. The panel then issued a corrected partial final award that concluded, inter alia, that the US$10.1 million paid by Allied to settle the other litigation did amount to a loss under the policies. AISLIC sought to vacate the corrected partial final award and to confirm the original partial final award. The court agreed, finding that the panel had exceeded its authority when it reconsidered the partial final award because it was then *functus officio*. The court noted that AISLIC and Allied had agreed that the panel was to make an immediate, final determination as to liability (including whether Allied had suffered a loss under the policies).

In a second case, *General Re Life Corp v Lincoln National Life Insurance Co*,[95] the Second Circuit joined the Third, Fifth, Sixth, Seventh and Ninth Circuits in recognising an exception to the *functus officio* doctrine. The contract at issue provided that if General Re exercised its option to increase premiums, Lincoln could 'recapture' its life insurance premiums rather than pay the increased premiums. A dispute arose over whether General Re had validly exercised its right to increase premiums. The tribunal concluded that General Re was entitled to increase the premiums and that, if Lincoln exercised its right to recapture following the arbitration, all premiums paid after the recapture date should be unwound.

Lincoln exercised its recapture right following the issuance of the award, and a dispute arose over the handling of premiums paid before the recapture date. Lincoln sought clarification from the tribunal, which issued a clarification holding that the final award contained ambiguities requiring clarification, and clarifying that, read together with the contract at issue, the final award entitled General Re to retain the premiums it held as of the recapture date, but that General Re remained liable for paying claims for all covered deaths associated with those premiums.

The federal district court in Connecticut confirmed the clarification of the award. The Second Circuit affirmed, holding that the panel had not exceeded its powers by issuing the clarification because there is an exception to the *functus officio* doctrine when an arbitral

93 Id. at 1168.

94 167 AD3d 142 (1st Dep't 2018).

95 909 F3d 544 (2d Cir 2018).

award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation. The court reasoned that a tribunal does not become *functus officio* when it issues a clarification of an ambiguous final award so long as the final award is ambiguous, the clarification clarifies the award rather than substantively modifying it and the clarification comports with the parties' intent as set forth in the arbitration agreement. The court concluded that all three conditions were met.

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:

> *(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.*[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 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 the purposes of the statute. Some

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 Telecomunicaciones 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) ('[T]he 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 *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 Gary Born, *International Commercial Arbitration 2,400–22* (second edition 2014), discussing the use of Section 1782 under US law to obtain evidence for use in international arbitration.

100 Intel, 542 US at 248-49.

101 Id. at 258.

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 come within the statute.[102]

The debate continued this year. In *In re Application of the Children's Inv Fund Foundation*,[103] a federal district court in New York granted a Section 1782 application seeking to compel the respondents in a London Court of International Arbitration arbitration to produce documents and submit to depositions. The court found that private arbitrations constitute 'a proceeding in a foreign or international tribunal' for purposes of Section 1782, relying on the Supreme Court's decision in *Intel* and an earlier New York federal court decision holding that a London Maritime Arbitration Association tribunal was a foreign or international tribunal under Section 1782.

By contrast, a federal district court in South Carolina held in *In re Servotronics*[104] that private arbitral bodies do not constitute tribunals under Section 1782. Servotronics filed a Section 1782 request to depose employees at Boeing's facilities in South Carolina for use in an arbitration Servotronics was involved in with Rolls-Royce. The court rejected the application, relying on Second and Fifth Circuit precedent holding that private arbitral bodies do not constitute tribunals under Section 1782. The court further reasoned that the Supreme Court's decision in *Intel* did not change those holdings because the Supreme Court never mentioned the Second and Fifth Circuit decisions and did not specifically discuss arbitral tribunals, much less private arbitral tribunals. The court thus concluded that *Intel* did not alter the Second and Fifth Circuit's decisions and that private arbitral bodies do not fall within the purview of Section 1782.

Section 1782 applications have also been rejected in two other cases this year. In *Tiptop Energy Production US LLC v. Uni-Top Asia Investment Ltd*,[105] the respondent made a Section 1782 request for discovery regarding the finances of two US subsidiaries of Chinese oil company Sinopec. Uni-Top claimed that it sought the discovery to support its bid to execute an arbitral award in a Hong Kong court. The federal court in Oklahoma declined the application, finding it was premature because the award had not yet been confirmed and the confirmation proceedings had been suspended pending the outcome of set aside proceedings in Beijing.

Similarly, in *In re del Valle Ruiz*,[106] del Valle and other investors involved in two investor–state arbitrations against Spain sought discovery from Santander and its subsidiaries under Section 1782. A New York federal court declined, holding that it lacked authority to grant the applications because the Santander banking group was not 'found' in the district of New York, as required under Section 1782, despite the fact that Santander maintains branches in New York, is supervised by New York state financial services authorities, manages US$14.8 billion of assets there and is listed on the New York Stock Exchange. However, the court granted the Section 1782 application with regards to Santander Investment Securities because it was undisputed that the entity maintained its principal place of business in New York. The case is now on appeal before the Second Circuit.

102 For a recent discussion of this issue see *In re Gov't of Lao People's Democratic Republic*, No. 1:15-MC-00018, 2016 US Dist LEXIS 47998 (DN Mar Is 7 April 2016).

103 No. 18-00104, 2019 WL 400626 (SDNY 30 January 2019).

104 No. 2:18-mc-00364-DCN, 2018 WL 5810109 (DSC 6 November 2018).

105 Order No. 5:18-cv-00783-SLP (WD Okla 8 January 2019), ECF No. 24.

106 342 F Supp 3d 448 (SDNY 2018), appeal filed (2d Cir 4 December 2018).

Court action in aid of international arbitrations

In addition to ordering discovery pursuant to Section 1782, US courts may also take other actions to aid arbitrations, including attaching assets of parties involved in arbitrations, enforcing subpoenas issued by the arbitral tribunal and imposing sanctions against parties that fail to comply with arbitral awards.

For example, in *Doosan Power Systems v. GMR Infrastructure Ltd*,[107] a New York state court issued two attachment orders allowing Doosan to freeze GMR's assets. Doosan had filed a SIAC arbitration against three GMR entities, alleging that GMR had fallen behind on payments for work on a coal-fired power plant in India. Immediately after commencing the arbitration, Doosan successfully obtained a pair of orders from a New York state court temporarily restraining the GMR entities and their alter egos from transferring their assets.[108] After GMR failed to comply with various discovery orders issued by the court, the New York court issued an order in March 2018 attaching US$102.8 million of GMR's assets through the completion of the SIAC arbitration.[109] In November 2018, Doosan asked the court to provide greater specificity as to the parties and assets covered by the March 2018 attachment order, which the court did.[110]

In *Washington National Insurance Co v. Obex Group LLC*, a federal court in New York enforced two summonses issued by an arbitral tribunal.[111] The arbitral panel had issued summonses requiring the respondents to appear as witnesses at a hearing and to bring with them certain documents, to which the respondents objected. The panel proceeded with the hearing, but the respondents failed to appear. The panel then issued an order stating '[t]he Panel unanimously affirms that the Arbitration Summonses should be enforced by a Court of appropriate jurisdiction' and granted claimants leave to pursue judicial intervention to obtain compliance with the summonses.[112]

Washington petitioned the federal district court in New York to enforce the summonses, and the court granted the petition. Among other things, the court found that the arbitrators, not the court, had the power to rule on the merits of objections to the summonses, observing that courts in the Second Circuit generally defer on evidentiary issues to arbitrators, and that the panel had stated in its order that the evidence was relevant and the summonses should be enforced by a court. The court concluded that '[t]he panel is far better positioned than this Court to make any assessment of whether the non-parties' testimony is material, cumulative, or otherwise objectionable'.[113]

In *Sistem Muhendislik Insaat Sanayi Ve Ticaret AS v. Kyrgyz Republic*,[114] a federal court in New York imposed sanctions of US$5,000 per day on the Kyrgyz Republic for failing to comply with certain discovery orders. In November 2016, the court had recognised an

107 No. 656479/16 (Sup Ct, New York County).

108 Order to Show Cause for Attachment and Temporary Restraining Order in Aid of Arbitration and for Expedited Discovery, No. 656479/16 (Sup Ct, New York County 13 December 2016, filed 14 December 2016), Doc 63.

109 Order No. 656479/16 (Sup Ct, New York County 1 March 2018, filed 7 March 2018), Doc 265.

110 Amended Order, No. 656479/16 (Sup Ct, New York County 21 December 2018, filed 1 January 2019) Doc 422.

111 No. 18 CV 9693 (VB), 2019 WL 266681 (SDNY 18 January 2019).

112 Id. at *2.

113 Id. at *7 (internal quotation marks and citation omitted).

114 No. 12-CV-4502 (ALC), 2018 WL 5629900 (SDNY 31 October 2018).

arbitration award in favour of Sistem,[115] after which the parties proceeded with post-judgment discovery. The Kyrgyz Republic repeatedly failed to comply with discovery orders issued by a magistrate judge, and in March 2018 the magistrate judge issued an order recommending that the Kyrgyz Republic be held in contempt and sanctioned US$5,000 per day until it satisfied the judgment or complied in full with the outstanding discovery orders. The Kyrgyz Republic made no objections and did not appear at the hearing, and the court adopted the magistrate judge's sanction recommendations in full.

ii Dispute resolution under the United States–Mexico–Canada agreement

The United States–Mexico–Canada agreement (USMCA)[116] (also known as the new NAFTA) was signed on 30 November 2018, but it has not yet been ratified. Chapter 14 of the USMCA contains an investor–state dispute settlement (ISDS) mechanism that is significantly more limited in several respects than those contained in Chapter 11 of the present North America Free Trade Agreement (NAFTA). First, Canada is not a party to the ISDS mechanism, so Canadian investors no longer would be able to bring claims against the US or Mexico; nor would US or Mexican investors be able to bring claims against Canada. Second, only claims for direct expropriation or discrimination may be submitted to ISDS, with a sole exception if the claim arises out of investment contracts with host states in certain covered sectors, including power generation, telecommunications, transportation, infrastructure and oil and gas. In those cases, claims may be brought alleging violations of any of the substantive protections in Chapter 14 (including fair and equitable treatment claims).

It remains to be seen whether, and if so when, the USMCA will be ratified by the US, Canada and Mexico, and NAFTA terminated. In early December 2018, President Trump declared that he would soon notify Congress of his intention to terminate NAFTA, but he has yet to do so. Some commentators believe that ratification may be more difficult with a Democrat-controlled House of Representatives.

If NAFTA is terminated and the USMCA is ratified, US and Mexican investors in Canada and Canadian investors in the US or Mexico will only be able to bring ISDS claims under NAFTA for another three years after NAFTA's termination.

iii Investment treaty cases involving the United States or US nationals

One of the most noteworthy cases involving US nationals this year was *Chevron Corp v. Republic of Ecuador*.[117] Chevron's subsidiary, Texaco Petroleum, was a minority partner in an oil production consortium in Ecuador along with the state-owned oil company Petroecuador. In 1995, Texaco entered into an agreement with Ecuador in which it agreed to remediate certain environmental impacts in the former concession area, while Petroecuador assumed responsibility for performing other environmental cleanup. Texaco completed the

115 No. 12-CV-4502 (ALC), 2016 WL 5793399 (SDNY 30 September 2016), affirmed, 741 F Appx 832 (2d Cir 2018).

116 Agreement between the United States of America, the United Mexican States, and Canada, available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (accessed 21 March 2019).

117 *Chevron Corp v. Republic of Ecuador*, PCA case No. 2009-23, Second Partial Award on Track II (30 August 2018).

environmental remediation work it was obligated to do under the agreement and was released from further environmental liability. Petroecuador, however, did not complete its share of the environmental remediation work.

In 2009, Chevron filed an investment treaty claim against Ecuador alleging that Ecuador breached the 1995 agreement and seeking to enforce the releases. In 2011, a court in Lago Agrio, Ecuador, rendered a judgment finding that Chevron had failed to comply with its environmental remediation obligations under the 1995 agreement. This prompted Chevron to amend its claim in the treaty arbitration to add a denial of justice claim arguing that the *Lago Agrio* judgment was procured through fraud and corruption.

The arbitral tribunal agreed with Chevron. In its partial award, issued in September 2018, the tribunal noted that there was overwhelming evidence that the *Lago Agrio* judgment was the product of fraud and corruption and that the judgment had been ghostwritten by representatives of the plaintiffs in the litigation in return for a bribe. The tribunal concluded that Ecuador had wrongfully committed a denial of justice by rendering the *Lago Agrio* judgment enforceable and knowingly facilitating its enforcement. The tribunal also concluded that the *Lago Agrio* judgment was based on claims that had already been settled and released.

Ecuador has applied to annul the decision in a Dutch court (the arbitration is seated in the Netherlands) and the court rejected it.The arbitral tribunal is expected to render a damages award setting out the extent of compensation Ecuador owes to Chevron.

The other major arbitration matter involving US nationals that has featured prominently this year is *ConocoPhillips v. PDVSA*.[118] This dispute relates to Venezuela's nationalisation in 2007 of two crude oil projects in the Orinoco belt in central Venezuela and has led to both an ICC arbitration and an ICSID arbitration. There were major decisions in both cases this year.

In the ICC arbitration, the arbitral tribunal awarded US$2 billion in damages to ConocoPhillips, making it one of the largest ICC awards in history. ConocoPhillips alleged that PDVSA breached its obligation under the contracts governing the two crude oil projects (association agreements) to indemnify ConocoPhillips if a discriminatory action occurred that caused significant economic damage or had a material adverse effect.[119] The tribunal found that the Venezuelan government's seizure of control of the operations and assets of the two oil projects, along with its increase in the income tax rate for the projects, both constituted discriminatory actions that caused significant economic damage and had a material adverse effect.[120]

ConocoPhillips further alleged that PDVSA breached its obligation to use reasonable commercial efforts to ensure the success of the projects and also breached its obligation to perform the association agreements.[121] The tribunal dismissed these claims. First, it recognised that there was an obligation to use reasonable commercial efforts in one of the association agreements (but not the other), but nonetheless concluded that ConocoPhillips had failed to prove that PDVSA did not exercise reasonable commercial efforts. Second, the tribunal found that PDVSA did not perform the contracts after 1 May 2007 (when Venezuela took control of the two oil projects), but nevertheless found that Venezuela should not be liable because the nationalisation of the oil projects was not attributable to it.[122]

118 ICC case No. 20549/ASM/JPA (C-20550/ASM), Final Award (24 April 2018).

119 Id. at Paragraph 94.

120 Id. at Paragraph 294.

121 Id. at Paragraphs 295–96.

122 Id. at Paragraph 473.

In the ICSID arbitration, the arbitral tribunal issued its long-awaited award on damages, in which it ordered Venezuela to pay ConocoPhilips US$8.7 billion.[123] The tribunal had held in previous decisions that Venezuela had breached its obligations under the Netherlands–Venezuela BIT,[124] and this award dealt solely with the issue of damages.

One central issue addressed by the tribunal was whether the compensation provisions in the association agreements limited Venezuela's liability. These provisions provided that if a discriminatory action is taken by the state and causes significant loss to the foreign investors, compensation must be provided to them by PDVSA or its relevant subsidiary. The tribunal found that these provisions did not limit liability, noting that the claimant's claim was for breach of the BIT, not for breach of the association agreements, and that the standard for compensation under the BIT (i.e., just compensation) prevails over any Venezuelan domestic law.[125] Having said that, the tribunal noted that the contractual provisions are still relevant for measures that constituted discriminatory actions under the contract.[126]

The tribunal also concluded that compensation should not be calculated at the time of the expropriation, plus interest, because that would mean that ConocoPhillips would be deprived of the difference between the market value estimated at the time and the benefit of the oil projects accrued since the expropriation. In other words, 'if 'just compensation' is determined as of the date of the expropriation, and taken forward through a simple rate of interest, the host State would draw a clear advantage from its taking, as it did in the present case'.[127]

The tribunal concluded by awarding a total of US$8.4 billion (plus future interest) to ConocoPhillips as compensation for breach of the BIT and US$286 million based on the compensation provisions in the contracts at issue. The tribunal also cautioned ConocoPhillips that it is under an obligation of good faith not to seek double recovery when seeking enforcement of this award beyond the US$2 billion awarded by the ICC tribunal.[128]

III OUTLOOK AND CONCLUSIONS

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. Despite some uncertainty regarding US policy on international investment arbitration under the Trump administration, US arbitration law nevertheless continues to develop in the context of a highly favourable judicial attitude.

123 See ICSID case No. ARB/07/30, Award (8 March 2019).

124 See ICSID case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013); ARB/07/30, Interim Decision (17 January 2017).

125 ICSID case No. ARB/07/30, Award, Paragraphs 169-70 (8 March 2019).

126 Id. at Paragraph 181.

127 Id. at Paragraphs 227–28.

128 Id. at Paragraph 1010.

Appendix 1

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