The International Arbitration Review

Eleventh Edition

Editor
James H Carter

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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 2020

Chapter 40

UNITED STATES

James H Carter, Claudio Salas 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 once a new treaty enters into force with Canada and Mexico. Meanwhile, the US Supreme Court and other courts continue to add clarifications and refinements to international arbitration law, including with respect to arbitrations involving non-signatories, class action arbitrations and the 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 District of Colombia and 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 the 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 most types of arbitrations in the US, regardless of the subject matter of a 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

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

2 9 USC Section 2.

3 9 USC Section 3.

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 a 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 preempts 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 preempts 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 preempted 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

Non-signatories

This year, the Supreme Court decided *GE Energy v. Outokumpu*, a case concerning non-signatories to arbitration agreements. The plaintiff, Outokumpu, an operator of a steel plant, had entered into contracts, containing arbitration clauses, with Fives (Outokumpu–Fives contracts) to provide three cold rolling mills (required for the manufacturing and processing of certain steel products). Fives thereafter subcontracted with GE Energy to supply motors in a contract also containing an arbitration clause.

The motors supplied by GE Energy eventually failed. Outokumpu filed suit in federal court against GE Energy, the subcontractor, and GE Energy moved to dismiss and compel arbitration. The district court held that there was a written agreement to arbitrate, because GE Energy and Outokumpu were parties to the Outokumpu–Fives contracts by relying on the definitions of buyer and seller in those contracts, which explicitly included subcontractors.[11]

The Eleventh Circuit Court of Appeals reversed, holding that the New York Convention requires a written agreement between the parties, and GE Energy undeniably was not a signatory to the Outokumpu–Fives contracts.[12]

The Supreme Court reversed, holding that there is no conflict between the New York Convention and domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by non-signatories. The Court reasoned that the New York Convention was simply silent on the issue of non-signatories, and nothing in the Convention could be read to prohibit the application of equitable estoppel doctrines (including because the New York Convention does not state that an arbitration agreement could only be enforced if there is a written agreement). The Court further noted that because the Convention was drafted against the backdrop of domestic law, it would be unnatural to read the Convention to displace domestic doctrines in the absence of such language, particularly given that the Convention contemplates using domestic doctrines to fill gaps in the Convention.[13]

Significant lower court precedents have based a non-signatory's rights and duties in arbitration on doctrines such as estoppel or alter ego. The Ninth Circuit considered non-signatory issues in *Cerner Middle East Ltd v. iCapital, LLC*,[14] upholding an ICC award in which the arbitral tribunal based its jurisdiction over a non-signatory on an alter ego theory. The dispute related to a contract between Cerner and iCapital S/E that contained a provision referring disputes to ICC arbitration in France. Cerner filed a request for arbitration alleging that iCapital S/E had failed to make payments due under the agreement, and that iCapital S/E had been reorganised into iCapital, LLC without Cerner's consent, which Cerner alleged was

11 See *Outokumpu Stainless Steel USA LLC v. Converteam SAS*, civil action No. 16-00378-KD-C (S.D. Ala. 22 December 2016) and *Outokumpu Stainless Steel USA LLC v. Converteam SAS*, civil action No. 16-00378-KD-C, 2016 WL 7423406 (S.D. Ala. 21 November 2016).

12 *Outokumpu Stainless USA LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018).

13 *GE Energy Power Conversion France SAS, Corp v. Outokumpu Stainless USA, LLC*, 590 U.S. __ (2020).

14 *Cerner Middle East v. iCapital, LLC*, 939 F.3d 1016 (9th Cir. 2019).

contrary to the terms of the relevant agreement. This dispute was settled, and the settlement agreement signed by Cerner and iCapital, LLC contained a provision referring disputes to ICC arbitration.

However, Cerner soon initiated a second request for arbitration against iCapital, LLC and Dhaheri (the alleged owner of iCapital, LLC), contending that iCapital had failed to make payments called for by the settlement agreement. The tribunal issued an award determining that it had jurisdiction over both iCapital, LLC and Dhaheri, reasoning that iCapital, LLC had agreed to arbitration by signing the settlement agreement, and that Dhaheri was bound to arbitrate because, among other things, Dhaheri was the alter ego of iCapital. Cerner sought to enforce this award and attach funds belonging to Dhaheri in Oregon. While that case was pending, the Court of Appeal in Paris issued a decision confirming the tribunal's decision that it had jurisdiction over Dhaheri. The Ninth Circuit analysed the Paris Court's decision and concluded that a court of competent jurisdiction had determined that Dhaheri was properly within the jurisdiction of the arbitral tribunal.

Class arbitration

The perennial question of who decides on the availability of class arbitration was at issue again this year. Previously, six circuit courts (the Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits) had held that the availability of class arbitration is a fundamental question of arbitrability that is presumptively for a court to decide. This year, the Fifth Circuit joined them in *20/20 Communications v. Crawford*,[15] concluding that class arbitrability is a gateway issue for the courts to decide. It noted that class arbitrations differ from individual arbitrations in fundamental ways because class actions increase the size and complexity of the proceeding; class actions raise important due process concerns; and the protection of privacy and confidentiality of parties may be threatened in class actions. The court examined whether the arbitration agreement clearly and unmistakeably agreed to permit the arbitrator to determine the issue and concluded that it did not do so because the arbitration agreement prohibited the arbitrator from consolidating claims into one proceeding, and there would be no reason for parties to prohibit class arbitration but then permit an arbitrator to decide the issue.

This year also saw a further development in the long-running saga of *Jock v. Sterling*. As reported in the 2018 edition of *The International Arbitration Review*, Jock is a putative class action gender discrimination lawsuit that has been pending since 2008. The case was referred to arbitration, in which an arbitrator determined that the agreement permitted class arbitration despite the lack of express language to that effect in the arbitration agreement that each employee signed. This ruling led to a series of decisions from a New York federal district court and the Second Circuit Court of Appeals regarding the role of the courts in reviewing an arbitrator's authority to determine whether the parties agreed to class arbitration.

The arbitrator certified a class of 70,000 members, including several class members who had not consented to join the class arbitration (absent class members). The district court rejected a motion to vacate the arbitrator's certification decision, but the Second Circuit reversed and remanded the case for further consideration of whether the arbitrator had exceeded her authority in certifying a class that contained absent class members.

15 *20/20 Comm'ns v. Crawford*, 930 F.3d 715 (5th Cir. 2019).

The New York district court then vacated the arbitral award and held that the arbitrator had no authority to certify a class of claimants that included absent class members. The Second Circuit again reversed, noting that the American Arbitration Association (AAA) rules provide that an arbitrator can determine whether the arbitration clause permits class arbitration and holding that the arbitration agreement's incorporation of those AAA rules 'serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator',[16] and that the absent class members' signing of the arbitration agreement contractually expressed consent to the arbitrator's 'construction of their agreement.' The Second Circuit once again remanded to the district court to decide the issue of whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class for injunctive and declaratory relief.

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, enforcement of an award set aside at the seat, the European Court of Justice's decision in *Achmea*, waiver, assignability and *forum non conveniens*.

As reported in last year's edition, in the *Crystallex International Corp v. Petróleos de Venezuela SA* arbitration,[17] 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,[18] and the DC circuit affirmed in February 2019.[19]

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 2018, the district court in Delaware allowed Crystallex to attach common stock owned by Petróleos de Venezuela SA (PDVSA), a state-owned oil enterprise, under the theory that PDVSA was an alter ego of Venezuela.[20]

That decision was upheld by the Third Circuit in 2019. Preliminarily, the court found that it and the district court had jurisdiction over Venezuela because 'the jurisdictional basis from the action resulting in the judgment carries over to the post-judgment enforcement proceeding'.[21] Thus, the arbitration exception in the Foreign Sovereign Immunities Act (FSIA),[22] which provides the DC courts with jurisdiction to confirm the arbitral award

16 *Jock v. Sterling Jewelers, Inc*, 942 F.3d 617 (2d Cir. 2019).

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

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

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

20 *Crystallex Int'l Corp v. Bolivarian Republic of Venezuela*, 333 F Supp 3d 380 (D Del 2018).

21 *Crystallex Int'l Corp v. Petróleos de Venezuela, SA*, 932 F3d 126, 137 (3d Cir 2019).

22 28 U.S.C. § 1605(a)(6) provides: 'A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in this the action is brought[] . . . to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.'

against Venezuela, provided the jurisdictional basis to enforce the award.[23] The court also rejected Venezuela's argument that the district court could not use a finding of alter ego to attach the assets of a third party (PDVSA) without an independent basis for jurisdiction over the third party.[24]

The court then analysed *de novo* whether PDVSA was Venezuela's alter ego in light of the Supreme Court's decision in *First National Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*).[25] In *Bancec*, the Court held that a state instrumentality is presumed to have an independent status, but that the presumption can be overcome if the instrumentality is extensively controlled by its owner.[26] The Third Circuit found that PDVSA was extensively controlled by Venezuela because, among other things, Venezuela:

a wielded extensive economic control over PDVSA, including dictating to whom PDVSA sold oil and at what price;

b was the sole beneficiary of all of PDVSA's profits;

c exerted direct and extensive control over PDVSA's directors and officers; and

d used PDVSA to achieve domestic and foreign policy goals that had nothing to do with its business.[27]

PDVSA effectively conceded these facts,[28] but raised several challenges related to the scope of the test for extensive control under *Bancec*. The court rejected these challenges, including PDVSA's arguments that the test required that the plaintiff's injury result from the state's control of the instrumentality, that there existed a principal–agent relationship between the state and the instrumentality, and that the court apply a higher burden of proof than preponderance of the evidence. The court also found it did not separately need to take into consideration the interests of PDVSA's third-party creditors, since such consideration was one of the reasons the *Bancec* test was a high bar. Taking these interests into account as a separate prong would double count them.[29]

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 found the attached shares were used for commercial activity because, through them, PDVSA managed its ownership of PDV Holding Inc (a Delaware corporation) and its wholly-owned subsidiary, CITGO (another Delaware corporation). PDVSA argued that the shares were not used for commercial activity at the time of attachment because they were subject to US government sanctions. The court rejected this argument because, although the sanctions prohibited some commercial activity, such as the distribution of dividends to Venezuela, the shares could 'still be used by PDVSA to run its business as an owner, to appoint directors, approve contracts, and to pledge [PDV Holding's] debts for its own short term debt.'[30]

23 *Crystallex Int'l Corp v. Petróleos de Venezuela, SA*, 932 F3d at 137.

24 id. at 139.

25 *First National Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

26 *Crystallex Int'l Corp*, 932 F3d at 140 (citing Bancec, 462 U.S. at 629).

27 id. at 146-149.

28 id. at 146.

29 id. at 141-146.

30 id. at 151.

There are now numerous plaintiffs in federal court seeking to collect debts from Venezuela by attaching PDVSA's assets. The *Crystallex* case is furthest advanced,[31] but due to the economic sanctions the United States has imposed on Venezuela, Crystallex and other creditors will need to obtain a licence from the Treasury Department before seizing PDVSA's assets.

The *Bancec* test also played a role in *Esso Exploration and Production Nigeria Limited (Esso) v. Nigeria National Petroleum Corporation (NNPC)*.[32] In that case, a New York district court had to determine whether it had personal jurisdiction over the defendant, NNPC, Nigeria's state-owned oil company, before it could decide whether to enforce an arbitral award against NNPC annulled at the seat of the arbitration. Constitutional due process requires that a defendant must have had minimum contacts with the forum for a court to assert personal jurisdiction over that defendant. Esso argued, however, that NNPC was an alter ego of Nigeria, and US courts can assert jurisdiction over foreign sovereigns without satisfying constitutional due process. The court agreed that it was 'well established that if NNPC is considered an alter ego of Nigeria, then it should not be afforded due process rights and minimum contacts need not be established.'[33]

In applying the *Bancec* test, the court found that NNPC Nigeria exerts extensive control over NNPC's day-to-day business. Among other things, Nigeria:

a appoints and has the power to remove all of NNPC's board members, NNPC's managing director, all of its senior executives and other officials such as general managers;

b can make decisions without board approval that benefit Nigeria rather than NNPC, including approving payments that NNPC treats as interest-free loans to Nigeria;

c exerts control over NNPC's business transactions and budget, including by approving a substantial portion of NNPC's contracts; and

d uses NNPC's property as its own.[34]

The court concluded that NNPC was the alter ego of Nigeria and that the court had personal jurisdiction over NNPC. The court went on to find that even if constitutional due process were required, NNPC had had the required minimum contacts with the US to satisfy due process. NNPC had solicited and negotiated the underlying agreement in the US, and it had engaged in dollar transactions and used US banks in connection with performance under the agreement.[35]

On the merits, the court had to determine whether it should confirm the arbitral award against NNPC, which had been annulled in Nigeria, the seat of the arbitration. Article V(1)(e) of the New York Convention provides that a court may refuse to confirm an award when it 'has been set aside or suspended by a competent authority of the country in which, or the law of which, the award was made'. The Second Circuit found that a court can

31 The Supreme Court has denied Venezuela's and PDVSA's petition for *certiorari*, and the district court has lifted the prior stay of proceedings and ordered the parties to brief the court on the mechanics of a sale. See *Crystallex Int'l Corp v. Bolivarian Republic of Venezuela*, No. CV 17-MC-151-LPS, 2020 WL 2616225 (D. Del. 22 May 2020).

32 *Esso Exploration and Production Nigeria Limited v. Nigeria National Petroleum Corporation*, 397 F.Supp.3d 323 (S.D.N.Y. 2019).

33 *Esso Exploration*, 397 F.Supp.3d at 333.

34 id. at 335-340.

35 id. at 340-346.

enforce an award set aside at the seat if the judgment setting aside the award is contrary to US public policy 'because it offends notions of justice from the point of view of the United States'.[36] This 'public policy exception is narrow and available only in 'rare circumstances', and '[t]he standard is high[] and infrequently met'.[37] The Second Circuit has instructed that courts should consider four factors when exercising their discretion under Article V(1)(e): '(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectation; 3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.'[38]

The court found that the first factor weighed in favour of NNPC. The agreement was governed by Nigerian law and the dispute, which concerned how much of Esso's oil production Nigeria could take under the agreement, was arguably a non-arbitrable tax dispute under Nigerian law. The second factor also weighed in favour of NNPC. Esso argued that the Nigerian courts' finding that the dispute was non-arbitrable was unprecedented and thus a retroactive application of the law. The court disagreed, finding that the Nigerian courts had applied laws pre-existing the dispute to reach their determination. The third factor also weighed in favour of NNPC because 'Esso has multiple appeals pending in Nigeria and it was on notice that NNPC contested the Arbitral Panel's jurisdiction before the Award was issued'.[39] The fourth factor was potentially in Esso's favour by analogy. Nigeria used its alter ego NNPC to take more than its share of oil, depriving Esso of profit. When weighed together, however, the court found that these four factors did not warrant enforcing the award against NNPC.[40]

In another high-profile case this past year, the District of Columbia district court, in *Micula v. Government of Romania*,[41] carefully examined the decision of the European Court of Justice (ECJ) in *Slovak Republic v. Achmea BV*, which Romania cited as a defence against the enforcement of the petitioners' US$331 million ICSID award. Romania argued that the rationale in *Achmea* had nullified the dispute resolution clause in the Sweden–Romania BIT that provided for investor–state arbitration, which had been the basis for the petitioners' ICSID award. Thus, Romania argued, the FSIA's arbitration exception did not apply, and the court lacked jurisdiction.[42]

In examining *Achmea*, the court found that the ECJ had invalidated the arbitration provision at issue because 'the dispute called upon the arbitral tribunal to interpret or apply EU law and the tribunal's ultimate resolution of any question of EU law was not subject to review by a court or tribunal within the EU's judicial system'.[43] The court concluded that the 'concern that animated *Achmea* – the un-reviewability of an arbitral tribunal's determination of EU law by an EU court – is not present in this case' because the events underlying the ICSID award all took place prior to Romania's accession to the EU in 2007.[44] The Sweden–Romania BIT entered into force in 2003; Romania repealed the incentives the petitioners

36 id. at 351.
37 Id.
38 Id.
39 id. at 354.
40 id. at 351-354.
41 *Micula v. Government of Romania*, 404 F.Supp.3d 265 (DDC 2019).
42 *Micula*, 404 F.Supp.3d at 277.
43 id. at 279.
44 Id.

relied on in making their investment in 2004; the repeal took effect in 2005, giving rise to the damage that the ICSID award compensated; and petitioners sought ICSID arbitration later that year. In sum, the court found that 'Romania's challenged actions occurred when it remained outside the EU and subject to, at least primarily, its own domestic law'[45] and that the interpretation or application of EU law was not at issue in *Micula* as it was in *Achmea*. The court found support for its holding in a decision the General Court of the ECJ issued a few months earlier regarding the same facts. The General Court noted that 'the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgement [in] *Achmea*'.[46] Finding that *Achmea* did not deprive it of jurisdiction, the court confirmed the ICSID award against Romania.

There are at least six other enforcement proceedings pending before the DC district court that involve intra-EU investment treaties and therefore implicate *Achmea*. These six cases, some of which have been stayed pending annulment proceedings, are all against Spain and do not involve challenged actions occurring prior to Spain's joining the EU. In the underlying arbitrations, Spain argued that *Achmea* precluded the arbitral tribunals from exercising jurisdiction, but the tribunals disagreed, in part because they said they were not applying EU law but rather public international law under the relevant treaty. When it decides these cases, the district court will need to conduct a different analysis to determine jurisdiction than the analysis it conducted when deciding *Micula*.

Although not as high profile as the above three cases, two other enforcement decisions in the US this past year merit mention. In *Goldgroup Resources v. DynaResource de Mexico*,[47] the district court in Colorado weighed competing court orders regarding an arbitration award Goldgroup sought to confirm against DynaResource. The underlying agreement was governed by Mexican law and had an arbitration clause that provided for ICDR arbitration in Colorado. Goldgroup brought an arbitration proceeding against DynaResource in Colorado in 2014. DynaResource responded by seeking a court injunction in Colorado preventing the arbitration from going forward pending resolution of arbitrability by Mexican courts. In a lawsuit in Mexico, DynaResource sought declaratory relief that the arbitration agreement was unenforceable.[48]

The Colorado court found that the arbitration could proceed, while the Mexican court found that the arbitration agreement was not enforceable because the parties had waived their right to arbitrate when they previously participated in litigation in Mexico related to the underlying agreement. The arbitrator proceeded with the merits hearing in the arbitration despite the Mexican court order. DynaResource did not participate in those hearings, and the arbitrator issued an award in GoldGroup's favour.[49]

In confirming the award, the Colorado district court faced the issue of whether a court or an arbitrator should decide the question of waiver and, if it were a court, which court, and whether Mexican or US law applied.[50] The court found that a court should decide the issue of litigation waiver because a court was more expert in the subject than an arbitrator, that

45 id.

46 id. at 280.

47 *Goldgroup Resources v. DynaResource de Mexico*, 381 F.Supp.3d 1332 (D. Colorado 2019).

48 *Goldgroup Resources*, 381 F.Supp.3d at 1337-1342.

49 Id.

50 id. at 1347.

the issue of waiver had to be decided by a US court because the option agreement provided for arbitration in the US, and that US procedural law applied to the question of litigation waiver.[51] The court concluded that since the correct court had not found waiver, waiver could not provide a basis for vacating the award.[52]

In *Gretton Ltd v. Republic of Uzbekistan*,[53] the District of Columbia district court decided issues of assignability and *forum non conveniens*. First, the court found that Gretton could seek to enforce the underlying award even though it was an assignee and not one of the original parties to the arbitration. The court found that in this regard, the only requirement was that the award was made pursuant to an agreement to arbitrate.[54] Second, the court found that Uzbekistan's *forum non conveniens* argument was foreclosed by circuit precedent that held that 'only American courts may attach commercial property of foreign sovereigns located in the United States and, consequently, that no other court may provide the requested relief'.[55] Finally, the court ordered an evidentiary hearing to resolve questions regarding Uzbekistan's argument that it had not been properly served and the court thus lacked personal jurisdiction.

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 reviews of arbitral awards except in very narrow circumstances. Over the past seven decades, 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], are not subject, in the federal courts, to judicial review for error in interpretation.'[56] 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.[57] 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*

51 id. at 1347-1351.

52 id. at 1351.

53 *Gretton Ltd v. Republic of Uzbekistan*, No. 18-1755, 2019 WL 3430669 (DDC 30 July 2019).

54 *Gretton Ltd*, 2019 WL 3430669 at *4.

55 id. at *6.

56 *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).

57 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).

> *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.*[58]

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'.[59] It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard has survived *Hall Street*.[60]

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.[61] 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.[62] Both Circuits have found that a high standard must be met for the doctrine to apply.[63] The Fourth Circuit has ruled that the manifest disregard doctrine is still viable,[64] 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)'.[65] The Sixth Circuit found that, in addition to the grounds provided by the FAA,

58 *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.

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

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

61 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'.).

62 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).

63 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).

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

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

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'.[66] Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence.[67] For example, the First Circuit has 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.[68]

This year, the Sixth Circuit continued to recognise that manifest disregard may be a valid ground for vacatur, but declined to vacate on those grounds in the case before it in *Arabian Motors v. Ford Motor Company*. A Kuwaiti auto dealer challenged an arbitral award finding that Ford Motor Co had properly terminated the companies' resale agreement[69] and also argued that the arbitrator had manifestly disregarded the law by wrongfully interpreting a US statute applicable to motor vehicle franchise contracts. The Sixth Circuit rejected this argument, noting that the question of whether this statute applies to agreements between domestic manufacturers and foreign dealerships is 'an issue of national first impression', so that the arbitrator, at most, could have made an error in interpretation or application of the law, which is insufficient to constitute a manifest disregard of the law.

In a relatively rare reliance on the doctrine, a New York federal court held in *Credit Agricole v. Black Diamond Capital* that arbitrators had manifestly disregarded the law.[70] The court engaged in an extended analysis of the arbitral tribunal's calculation of certain payments, and concluded that the calculation in an amended final award exceeded the panel's powers. The case was appealed, but the appeal was withdrawn without a court of appeals ruling.

In contrast, a New York State appeals court declined to vacate an arbitral award on manifest disregard grounds in *Nexia Health Technologies v. Miratech*,[71] a case involving a claim

66 *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.

67 For the First Circuit, compare *Ramos-Santiago v. United Parcel Service*s, 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).

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

69 *Arabian Motors Group, WLL v. Ford Motor Company*, 775 Fed. Appx. 216 (6th Cir. 2019).

70 *Credit Agricole Corporate and Investment Bank v. Black Diamond Capital Mgmt*, LLC, 18-CV-7620(KNF), 2019 WL 1316012 (S.D.N.Y. 22 March 2019).

71 Nexia Health Technologies Inc v. Miratech Inc., 176 A.D.3d 589 (N.Y. App. Div. 2019).

that the arbitrator manifestly disregarded the law by not enforcing the liability limits in Nexia's contract with Miratech. The appeals court rejected that argument, saying the arbitrator had provided 'a colorable justification for the outcome reached' in the award.

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.[72] 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.*[73]

Older cases suggested that a foreign arbitration did not fall within the statute's purview, which was thought only to include foreign judicial proceedings.[74] 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.[75] 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'.[76] The Court also relied on a definition of tribunal that included arbitral tribunals.[77]

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

72 '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).

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

74 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).

75 *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.

76 *Intel*, 542 US at 248-49.

77 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.[78]

The district courts remained split this year.[79] However, two new circuit court decisions held that private commercial arbitrations are proceedings in foreign or international tribunals under Section 1782. The Sixth Circuit's decision in *Abdul Latif Jameel Transportation Company v. Fedex*[80] involved a Section 1782 application seeking documents and a deposition from FedEx Corp for use in two DIFC/LCIA arbitrations in Saudi Arabia and Dubai. The court concluded that the text, context and structure of Section 1782 led it to a decision that the word tribunal includes private commercial arbitration panels established pursuant to a contract and having the authority to issue decisions that bind the parties.

The Fourth Circuit's decision in *Servotronics Inc v. The Boeing Company* involved a Section 1782 petition seeking to subpoena certain Boeing employees residing in South Carolina. Servotronics was defending itself against a claim asserted by Rolls-Royce PLC in an English arbitration, which alleged that a fire was caused by a Servotronics-manufactured valve that malfunctioned. The Fourth Circuit concluded that the arbitral panel is a foreign or international tribunal under Section 1782(a), reasoning that the panel was 'acting with the authority of the state' because the English Arbitration Act of 1996 provides for governmental regulation and oversight (indeed, even more oversight than provided by the FAA).[81]

Another key circuit court decision this year extended assistance to a party in a court prodeeding but involved a principle also potentially relevant to arbitration. In that case, *In re del Valle Ruiz*, the Second Circuit ruled that there is no per se bar against using Section 1782 to reach documents outside the United States. Investors in a Spanish bank filed a Section 1782 petition seeking discovery of documents from Bank Santander and several of its US subsidiaries. The district court concluded that it had general jurisdiction over only Santander's US-based securities firm and granted the Section 1782 petition against the US firm but ordered it to produce documents that included those located abroad. The Second Circuit affirmed, holding that 'where discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery'. This decision established that foreign firms doing business in the Second Circuit may be compelled to produce documents and witnesses abroad under Section 1782. While the location of the evidence is still relevant, it is no longer the case that the statute only applies to evidence located in the United States.

78 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).

79 Compare *HRC-Hainan Holding Company, LLC v. Hu*, 19-MC-80277, 2020 U.S. Dist. LEXIS 32125 (N.D. Cal. 25 February 2020) (granting a Section 1782 application because a CIETAC proceeding is a proceeding before a foreign or international tribunal) with *In Re: EWE Gasspeicher GmbH*, 1:19-mc-00109 (D. Del. 2020) (denying a Section 1782 application because a private commercial arbitration is not a tribunal for the purposes of Section 1782).

80 *Abdul Latif Jameel Transportation Company v. Fedex*, 939 F.3d 710 (6th Cir. 2019).

81 *Servotronics v. Boeing Company*, 954 F.3d 209 (4th Cir. 2020).

Court action in aid of international arbitrations

In addition to ordering discovery pursuant to Section 1782, US courts may also take other actions, including injunctions in aid of arbitration. An example this year was *Deutsche Mexico v. Accendo Banco*, in which a federal court in New York issued an injunction ordering Accendo Banco to withdraw an *ex parte* order it had obtained from a Mexican court barring Deutsche Mexico from selling one of its subsidiaries.[82] Deutsche Mexico had entered into a purchase agreement to sell the subsidiary to Accendo Banco, but the transaction did not close by the deadline under the agreement, and Accendo obtained an *ex parte* order from a Mexican court enjoining Deutsche Mexico from selling its subsidiaries to any party other than Accendo. Accendo filed a request for ICC arbitration in New York and served the *ex parte* order on Deutsche Mexico, which then filed a request for injunctive relief in a federal court in New York, requesting an order requiring Accendo to withdraw its *ex parte* Mexican injunction.

The court observed that the Mexican injunction sought to freeze a sale of Deutsche Mexico's subsidiaries in a manner contrary to the New York arbitrator's possible ruling, and concluded that it had jurisdiction because the requested relief was in aid of arbitration. The court issued the order because Deutsche Mexico had satisfied the standard for enjoining a party from pursuing parallel litigation in a foreign forum: both proceedings involved the same parties in interest, and the resolution of this dispute would be dispositive as to the rights of the parties to seek relief in aid of arbitration from any non-New York court. The court also analysed the traditional factors for injunctive relief and found they were all met:

a Deutsche Mexico was likely to succeed on the merits that the Mexican injunction was a violation of the purchase agreement, in light of the forum selection clause;

b Deutsche Mexico faced a high likelihood of irreparable harm because the Mexican order threatened to force Deutsche Mexico to litigate in a forum it contracted to avoid, or to prevent Deutsche Mexico from selling its Mexican subsidiaries; and

c the public interest favoured enforcing contracts between sophisticated entities.

Reasoned awards

The issue of what constitutes a reasoned award is not litigated frequently in US courts but was examined by the Second Circuit in *Smarter Tools v. Chongqing Senci Import & Export Trade Inc*, which involved an arbitral award rendered in a dispute over gas-powered generators manufactured by a Chinese company, Senci. A New York federal court ruled that the award did not meet the standard for a reasoned award, which was required by the arbitration clause, because it contained no rationale for rejecting Smarter Tools' claims.[83] In dismissing Smarter Tools' arguments, the arbitrator simply stated that '[h]aving heard all of the testimony, reviewed all of the documentary proofs and exhibits, [he does] not find support for [Smarter Tools'] claims'. No reasons were given for his rejection of the claims, other than a negative credibility determination regarding Smarter Tools' expert witness. The district court remanded to the arbitrator so that he could issue a sufficiently reasoned award.

82 *Deutsche Mexico Holdings SARL v. Accendo Banco, SA*, No. 19 Civ 8693, 2019 WL 5257995 (S.D.N.Y. 17 October 2019).

83 *Smarter Tools, Inc v. Chongqing Senci Import & Expert Trade Co Ltd*, 18-cv-2714 (AJN), 2019 WL 1349527 (S.D.N.Y. Mar. 26, 2019).

Both Smarter Tools and Senci appealed this decision to the Second Circuit, which dismissed the appeal and allowed the decision to stand. The court held that it lacked jurisdiction over the appeals because the New York federal court's order to the arbitrator to make a further decision was not appealable.[84]

Arbitrator disclosure

In *Monster Energy Co v. City Beverages*, the Ninth Circuit vacated an award on evident partiality grounds, holding that the sole arbitrator's failure to disclose that he was a co-owner of the dispute resolution firm JAMS, coupled with the fact that the institution has administered 97 arbitrations for Monster over the past five years, created a 'reasonable impression of bias' that justified setting an award aside.[85] While the arbitrator had disclosed that he had an economic interest in JAMS and his involvement as arbitrator in a previous case involving Monster, the Ninth Circuit said those disclosures only implied that the arbitrator, like any other JAMS arbitrator or employee, had 'a general interest in JAMS's reputation and economic wellbeing and that his sole financial interest was in the arbitrations that he himself conducted.' However, as a co-owner of JAMS, the arbitrator had a right to a portion of profits from all its arbitrations, not just those he personally conducts, and that interest 'greatly exceeds' the general economic interest that all JAMS neutrals have in the organisation. The court therefore held that arbitrators must disclose their ownership interests, if any, in the arbitration organisations with which they are affiliated in connection with proposed arbitrations, and must disclose those organisations' non-trivial business dealings with the parties to an arbitration.

Nine arbitrator tribunal

Although in theory parties to an arbitration agreement are free to choose any number of arbitrators to decide their disputes, in practice arbitrations are almost always decided by one or three arbitrators. And while in theory parties could agree that those on one side of a dispute would select more arbitrators than the other, this is rarely the case in practice. This past year, however, in a case where the theoretical was seen in practice, the Fifth Circuit upheld the decision of a nine-arbitrator tribunal where one side selected more arbitrators than the other.

The dispute arose from a joint-venture agreement among Dallas-based Tang Energy group, Catic USA (the California subsidiary of the Aviation Industry Corporation of China (AVIC)) and other investors to form a vehicle, Soaring Wind Energy, LLC, for wind-energy marketing and project development. After several years in which Catic USA made no investments in Soaring Wind Energy, Tang Energy brought an arbitration against Catic USA, several AVIC affiliates and businessman Paul Thompson upon learning that the AVIC affiliates had separately invested in the US wind energy market. Thompson, who was a party to the Soaring Wind agreement, was the CEO of one of the AVIC affiliates.[86]

There were seven investor members of the joint venture agreement, and its arbitration provision permitted each disputing member involved in a particular dispute to appoint an arbitrator. In addition to Tang Energy, four other members joined the arbitration against Catic USA and Thompson. The AVIC affiliates refused to participate in the arbitration

84 *Smarter Tools, Inc v. Chongqing Senci Import & Expert Trade Co Ltd*, 2019 WL 8403145 (2d Cir. 12 November 2019).

85 *Monster Energy Co v. City Beverages*, 940 F.3d 1130 (9th Cir. 2019).

86 *Soaring Wind Energy, LLC v. Catic USA Inc*, 946 F.3d 742, 748 (5th Cir. 2020).

because they were not parties to the joint venture agreement. Accordingly, there were five parties on the Tang Energy side and only two parties on the Catic USA side. Each party selected an arbitrator, resulting in a five–two alignment against Catic USA and Thompson. The agreement also provided that the appointed arbitrators would choose one or two additional arbitrators as necessary to have an odd-numbered tribunal. The seven appointed arbitrators chose two additional arbitrators to constitute a nine-member tribunal.[87]

The tribunal ultimately decided the case against Catic USA, the AVIC affiliates and Thompson, finding that Catic USA had breached the joint venture agreement through the actions of one of the AVIC affiliates. It further found that AVIC operated as one group and that Catic USA and its AVIC affiliates were jointly liable to the claimants for US$62.9 million in lost profits and US$8.6 million in costs. The tribunal also ordered Catic USA and Thompson to divest their equity interests in Soaring Wind Energy. The award was confirmed in federal district court.[88] On appeal, Catic USA argued, among other things, that the arbitration panel was improperly constituted because each side should have had an equal number of arbitrators.[89] The Fifth Circuit observed that, under the FAA, an award should be vacated if the arbitrator selection process did not conform to the arbitration agreement. However, in this case the Fifth Circuit found it clear that there were seven parties to the arbitration agreement, and that each party that joined in a given dispute had the right to choose an arbitrator.[90] The court rejected Catic USA's argument that the agreement had led to 'the formation of a stacked, unfair arbitration panel[,] an absurd result to which no reasonable party would ever agree'.[91] The Fifth Circuit found that the result was squarely within the parties' agreement, that it was 'not the court's role to rewrite the contract between sophisticated market participants' and that it could not 'discard the plain text of the Agreement out of so-called fairness'.[92] The court observed: 'One must assume that Catic USA did not expect to be outnumbered in any dispute falling under the Agreement; that its expectations were frustrated does not render the Agreement absurd or unfair.'[93]

Sanctions for the unsuccessful challenge of an arbitral award

Continuing a series of such decisions in recent years, the Eleventh Circuit in *Inversiones y Procesadora Tropical INPROTSA SA v. Del Monte* affirmed a district court's order directing a Costa Rican pineapple farm to pay attorneys' fees as a sanction because its unsuccessful challenge to an arbitral award lacked any real legal basis.[94] The court affirmed the standard it had set out in *BL Harbert Int'l v. Hercules Steel Co*, which stated that sanctions are appropriate when an arbitral award is frivolously challenged without any real legal basis for doing so. The Eleventh Circuit rejected the argument that an explicit finding of bad faith was needed when

87 *Soaring Wind Energy*, 946 F.3d at 748.
88 id. at 749.
89 id. at 755.
90 Id.
91 id. at 756.
92 Id.
93 id.
94 *Inversiones y Procesadora Tropical INPROTSA SA v. Del Monte International GmbH*, 783 Fed. Appx. 972 (11th Cir. 2019).

awarding sanctions, holding that 'the Hercules Steel standard inherently includes a bad-faith finding because it requires finding that a party has attacked an arbitration award without any legal basis for doing so'.

ii Statutory and treaty developments

The United States-Mexico-Canada Agreement (USMCA), which replaces the North America Free Trade Agreement (NAFTA), is expected to go into effect on 1 July 2020. The USMCA was signed initially in 2018 but was subsequently revised to increase labour rights and environmental protections. Negotiators for the United States, Canada and Mexico signed the revised version in December 2019. The treaty has now been ratified by all three countries.

While Chapter 11 of NAFTA provided a robust investor–state dispute settlement (ISDS) mechanism, the ISDS mechanism in Chapter 14 of the USMCA significantly curtails the availability of arbitration for investors.

First, Canada is not a party to the ISDS mechanism, so Canadian investors no longer will be able to bring claims against the US or Mexico; nor will US or Mexican investors be able to maintain claims against Canada. Canadian and Mexican investors do have access to the comprehensive ISDS mechanism available under the Trans-Pacific Partnership (TTP), and can thus bring claims in disputes involving Mexico and Canada. This is not the case, however, with respect to investors in disputes involving the United States and Canada, because the US withdrew from the TTP.

Second, investors in disputes involving Mexico and the United States will have access to arbitration, but only on a restricted basis. Investors that do not have a covered government contract in a covered sector will only be able to bring claims based on national treatment, most favoured nation and direct expropriation. Even more restrictively, they must first pursue local court proceedings to completion, or at least for 30 months, before submitting a claim in arbitration.[95] Investors with a covered government contract in a covered sector, on the other hand, may also bring claims for indirect expropriation and for violations of the minimum standard of treatment. Just as importantly, these investors do not have to litigate in local courts; they only need to abide by Chapter 14's six-month cooling-off period. The covered sectors include state-controlled oil and gas; power generation, telecommunications and transportation provided to the public on behalf of a government; and infrastructure not predominantly used by government.[96]

The USMCA ISDS mechanism will not be fully effective immediately. NAFTA has a sunset clause, permitting investors from all three countries to have access to investor–state arbitration for the next three years, provided they made their investments while NAFTA still was in effect.[97]

In the past year, the House of Representatives passed the Forced Arbitration Injustice Repeal Act (FAIR Act), which would need Senate passage and a Presidential signature to become law. The Act, which is unlikely to achieve those approvals, would prohibit arbitration agreements covering civil rights disputes, consumer claims, employment disputes and certain types of antitrust disputes, and it would also prohibit any type of class, joint or collective action waiver in arbitration or litigation. The FAIR Act reflects a growing concern in the United States over the past decade with mandatory arbitration agreements between parties

95 USMCA, Chapter 14, Annex 14-D.
96 USMCA, Chapter 14, Annex 14-E.
97 USMCA, Chapter 14, Annex 14-C

with unequal bargaining power, especially between individuals and companies, that may affect perceived fundamental rights. This concern has been accentuated by the class arbitration line of cases, in which the Supreme Court has strictly enforced class action waivers in consumer and employment agreements, among others.

The Democratically controlled House has passed similar acts in past years that have failed to become law, and it is likely that Democrats will continue to introduce similar legislation in future years. In principle, such legislation would have little or no impact on international arbitration, but there is concern in the international arbitration community that any curtailing of arbitration by Congress could have unintended consequences on international arbitration or could lead to other legislation or judicial actions limiting the scope of international arbitration.

iii Investment treaty cases involving the United States or US nationals

As we reported in last year's edition, in March 2019, an ICSID tribunal awarded US$8.7 billion to American oil company ConocoPhillips, finding that Venezuela had expropriated ConocoPhillips's oil assets in the Orinoco Belt. Since then, the award has come under challenge. First, in August 2019, the tribunal issued a rectification award, deducting around US$227 million from the award due to arithmetic errors.[98] Then, in December 2019, Venezuela filed an application with ICSID to annul the award.

One of the interesting aspects of the case is that two different governments, and thus two different law firms, currently purport to represent Venezuela's interests. The government of opposition leader Juan Guaidó has instructed the Curtis Mallet law firm, while the de facto government of Nicolás Maduro has instructed De Jesús & De Jesús, a Panamanian firm. Both firms purported to represent Venezuela's interests in the rectification proceedings. In that award, the tribunal sidestepped the issue of which firm legitimately represented Venezuela, noting that they were both on the same side and therefore the issue was moot and did not require decision.[99] Undeterred by that finding, the Maduro government petitioned the annulment committee to bar Curtis Mallet from participating in the case, and has challenged all three members of the annulment committee because they refused to do so. The dispute has led to US enforcement litigation, which is not yet resolved.

98 *Conocophillips v. Republic of Venezuela*, ICSID case No. ARB/07/30, decision on rectification of the award (29 August 2019). In August 2019, ConocoPhillips reportedly also suffered a setback in a related Venezuela arbitration. *Law360* reported that in an unpublished award, an ICC tribunal rejected ConocoPhillips' US$1.5 billion claim related to the Corocoro project, awarding only US$54 million, for the repayment of a loan plus interest, and ordering ConocoPhillips to pay US$2.5 million of PDVSA's legal fees and 75 per cent of the arbitration costs. The ICC tribunal had previously awarded ConocoPhillips US$2 billion in 2108 for claims relating to two other projects (Petrozuata and Hamaca) in the Orinoco Belt. The ICSID tribunal's US$8.7 billion award included ConocoPhillips' expropriation claims related to all three projects, and awarded more than US$500 million for the Corocoro project. See Caroline Simson, 'Venezuela's Oil Co Sees ConocoPhillips' $1.5B Claim Nixed', *Law360*, 2 August 2019, https://www.law360.com/articles/1184917/venezuela-s-oil-co-sees-conocophillips-1-5b-claim-nixed.

99 *Conocophillips v. Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Rectification of the Award, Paragraph 25 (29 August 2019).

III OUTLOOK AND CONCLUSIONS

The international commercial arbitration regime in the US is stable and is tended by US courts with an eye to its effective operation. The outlook for investment arbitration, however, is uncertain. Over the past 25 years there have been a significant number of arbitrations under NAFTA, and NAFTA cases have furthered the development of investment treaty case law. The USMCA begins a new, less robust era in North America treaty arbitration. Time will tell whether the United States will take a similarly restrictive approach in future treaties in other parts of the world.

Appendix 1

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