# The International Arbitration Review

Fifth Edition

Editor
James H Carter

Law Business Research

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James H Carter

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# EDITOR'S PREFACE

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

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

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

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

**James H Carter**

Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2014

# Chapter 17

# ENGLAND AND WALES

*Duncan Speller and Christopher Howitt*[1]

## I INTRODUCTION

Arbitrations seated in England and Wales,[2] both international and domestic, are governed by the Arbitration Act 1996 (the Act).[3] The Act, which is based in many respects on the UNCITRAL Model Law, consolidated and reformed the existing arbitration law, introducing a modern and 'pro-arbitration' legislative regime. Although comprehensive, the Act does not codify all aspects of English arbitration law.[4] In consequence, as one commentator puts it, '[t]o the extent that the 1996 Act was intended to be a 'one-stop shop' it can be regarded as a comprehensive failure'.[5] Indeed, while the Act itself has remained in place since 1996, the courts have continued to shape and develop the law in interpreting and applying its provisions. Practitioners must therefore consult the common law as well as the Act to determine the status of the law on many issues.

### i The structure of the Act

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

1 Duncan Speller is a partner and Christopher Howitt is an associate at Wilmer Cutler Pickering Hale and Dorr LLP.

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

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

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

5 Merkin, Arbitration Act 1996, fourth edition, p. 1.

*a* Part I contains the key provisions relating to arbitration procedure, including the appointment of the arbitral tribunal, the conduct of the arbitration, and the powers of the tribunal and the court. Section 4 of Part I expressly distinguishes between mandatory provisions (i.e., those that have effect notwithstanding any agreement to the contrary) and non-mandatory provisions (i.e., those that can be opted out of by agreement). The mandatory provisions are listed in Schedule 1 of the Act;

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

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

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

### ii The main principles of the Act

The Act is based on three general principles, set out in Section 1, which have served as a starting point for judicial reasoning and innovation in the application of the Act. A member of the Departmental Advisory Committee on Arbitration (DAC), which helped draft the Act in consultation with arbitration practitioners and users, recently described these principles as the 'philosophy behind the Act'.[6] The principles are:

*a* fairness ('the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense');[7]

*b* party autonomy over the arbitration proceedings ('the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest');[8] and

*c* the restriction of judicial intervention in proceedings ('in matters governed by the [Part I] of the Act, the court should not intervene except as provided by [that] Part').[9]

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

7 Section 1(a) of the Act.

8 Section 1(b) of the Act.

9 Section 1(c) of the Act.

Section 1 of the Act provides that Part I is 'founded on' these principles and shall be 'construed accordingly', and the English courts continue to refer to the guiding principles in resolving disputes as to how the Act should be interpreted and applied.[10]

### iii The scheme of the Act

The general principles are also reflected throughout the provisions of Act. For example, the Act supports the general principle of fairness by imposing upon the parties the duty to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings', and upon the tribunal the duty to act 'fairly and impartially'[11] and to adopt suitable procedures 'avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.[12]

As for party autonomy, the Act reinforces this general principle through the non-mandatory nature of most of the provisions of Part I.[13] The courts in turn have emphasised in a number of judgments the importance to the arbitral process of party autonomy. Most recently, the Supreme Court in *Jivraj v. Hashwani*[14] upheld an arbitration clause that required arbitrators to be drawn from a particular religious group, when the Court of Appeal had found the clause void for offending against European anti-discrimination legislation.[15] In that judgment, their Lordships approved the following statement of the International Chamber of Commerce (ICC):

> *The raison d'être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (e.g., because neither party will submit to the courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties' positions, culture or perspectives).*[16]

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

11 Section 40 of the Act.

12 Section 33(1) of the Act.

13 See Section 4 of the Act.

14 [2011] UKSC 40.

15 Employment Equality (Religion or Belief) Regulations 2003.

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

The Act gives effect to the third principle – limited court intervention – in many of the mandatory provisions of Part I. Whereas the tribunal has substantial powers to decide all procedural and evidential matters,[17] to give directions in relation to property or the preservation of evidence,[18] and to order relief on a provisional basis,[19] the court has only a limited power to intervene in certain circumstances that will support the arbitration (such as appointing arbitrators where the agreed process fails[20] and summoning witnesses to appear before the tribunal).[21] Otherwise the court has the same powers for the purposes of and in relation to arbitral proceedings as it has in respect of legal proceedings, including in respect of the taking of evidence of witnesses, the preservation of evidence, and the granting of an interim injunction or the appointment of a receiver.[22] In this respect, the Act mirrors the UNCITRAL Model Law.[23]

In addition, the Act confers only limited rights of challenge of an award, including on the ground that the tribunal lacked substantive jurisdiction (under Section 67 of the Act), on the ground of serious procedural irregularity (under Section 68), or by providing the right of appeal on a point of law (under Section 69). As these provisions are designed to support the arbitral process and reduce judicial involvement in arbitral proceedings,[24] the courts have tended to place a 'high hurdle' on parties seeking to set aside arbitral awards,[25] insisting that such challenges are 'long stop[s] only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected'.[26] Although challenges of awards on the grounds of

17 Section 34 of the Act.

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

19 Section 39 of the Act.

20 Section 18 of the Act.

21 Section 43 of the Act.

22 Section 44 of the Act.

23 Section 17 J of the UNCITRAL Model Law.

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

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

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

serious procedural irregularity under Section 68, unlike appeals on points of law under Section 69, do not require leave, there is no evidence that this looser requirement has encouraged frivolous litigation.[27]

### iv Court relief in support of arbitration

A consistent theme in recent case law has been the English courts' exercise of their power to make orders in support of arbitrations seated in England and Wales. The Supreme Court has noted that the court has jurisdiction to grant an anti-suit injunction under Section 37 of the Senior Courts Act 1981 (SCA) even where there are no arbitral proceedings in contemplation or no statutory basis under the Act for an injunction, in circumstances where the court is seeking to support arbitration by requiring parties to refer their disputes to arbitration.[28]

### v Applications under the Act

Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act,[29] namely the Commercial Court (for general commercial arbitration) and the Technology and Construction Court (for construction disputes).

## II THE YEAR IN REVIEW

### i Developments affecting international arbitration in England and Wales

*The LCIA*

The London Court of International Arbitration (LCIA), established in 1892, remains one of the world's pre-eminent international arbitration institutions. At the time of writing, it appears unlikely that a new version of the LCIA Rules will be approved ahead of the LCIA Court's next meeting in May 2014. Notable proposed features include a new requirement that arbitrators expressly state before appointment that they are 'ready, willing and able to devote time, diligence and industry to ensure the expeditious conduct of the arbitration', and the introduction of general conduct guidelines applicable to party representatives.

In 2012, a total number of 265 disputes were referred to the LCIA for arbitration, an increase from the 224 disputes referred in 2011.[30] The nature of the contracts seen

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

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

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

30 LCIA Registrar's Report 2012 and LCIA Director General's Report 2011, www.lcia.org/LCIA/Casework_Report.aspx.

in the 2012 referrals to the LCIA remained diverse, ranging from emissions trading and sponsorship of sporting events, to oil exploration and the sale and purchase of commodities.[31] Of the three areas that have traditionally given rise to the most significant number of LCIA referrals, commodity transactions accounted for 16 per cent of 2012 referrals (as against 13 per cent in 2011); loan or other financial agreements, including guarantees, accounted for 11 per cent of 2012 referrals (as against 17.5 per cent in 2011); and joint ventures and shareholders' agreements accounted for 9 per cent of 2012 referrals (as against 13 per cent in 2011).[32]

The LCIA appointed 318 arbitrators to a total of 166 tribunals, 90 of which were comprised of a sole arbitrator and 76 a panel of three arbitrators.[33] This represents a swing in favour of sole arbitrators, the ratio between three-member tribunals and sole arbitrators being roughly 2:1 in 2009, 1:1 in 2010 and 1:1 in 2012. On the whole, parties continue to prefer to appoint their arbitrators rather than leave the task to the LCIA.[34]

***ICC arbitration***

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

London was again the second most chosen seat of arbitration under ICC rules in 2012, with 71 cases, an increase on the 62 in 2011.[35] English law was the most popular choice by parties (16.95 per cent) of the 88 per cent of cases registered in 2012 where parties had included a choice-of-law clause in the contract relating to their dispute.[36] British arbitrators remain the most popular nationality, representing 13.76 per cent of confirmed appointments in 2012.[37]

***LMAA and other arbitral institutions***

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

In 2013, the LMAA made 2,966 appointments, a notable decrease from the 3,849 appointments in 2012 and the 3,555 appointments in 2011.[38] 608 awards were rendered under LMAA Rules in 2013, as compared with 592 in 2011 and 631 in 2012.[39]

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31 LCIA Registrar's Report 2012, ibid.

32 LCIA Registrar's Report 2012, ibid.

33 LCIA Registrar's Report 2012, p. 4, ibid. According to that Report, 26 of these tribunals were appointed in cases that had been referred to arbitration in 2011,one in a case that had been referred to arbitration in 2010 and one in 2008, and the remaining 138 in arbitrations that commenced in 2012.

34 LCIA Registrar's Report 2012, p. 4, ibid.

35 ICC 2012 Statistical Report.

36 Ibid.

37 ICC 2012 Statistical Report.

38 www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

39 www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

### ii Arbitration developments in the English courts

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

***The English courts' willingness to issue anti-suit injunctions***

In *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, the Supreme Court confirmed the willingness of the English Courts to issue anti-suit injunctions to protect agreements to arbitrate in England. A notable feature of the case was that the respondent, AES Ust-Kamenogorsk Hydropower Plant LLP, had not commenced and had no intention or wish to commence arbitration proceedings against the appellant Ust-Kamenogorsk Hydropower Plant JSC (JSC). The Supreme Court, upholding the injunction ordered by both the High Court and Court of Appeal, made clear that the English Court will issue anti-suit injunctions in order to protect the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed.

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

There were two main strands to the Supreme Court's decision. First, the Supreme Court recognised that an arbitration agreement, in addition to giving rise to a positive right to arbitrate disputes in a particular forum, also contains a negative right not to be sued in any forum other than the forum specified in the agreement. The Supreme Court made clear that the negative aspect is 'as fundamental as the positive' and 'enforceable independently of the existence or imminence of any arbitral proceedings'.[40]

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

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

of it'. In other words, the Supreme Court made clear that the Act is not the exclusive source of relief available to parties in relation to arbitration agreements and proceedings.

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

The English courts' eagerness to issue anti-suit injunctions in support of arbitration agreements was further illustrated in the High Court case *Bannai v. Erez* (Trustee in Bankruptcy of Eli Reifman) [2013] EWHC 3689. In *Bannai*, the trustee of a large bankruptcy in Israel (Erez) applied to set aside *ex parte* anti-suit injunctions granted to the respondent (Dr Bannai) restraining commencement or pursuance of legal proceedings in Israel in respect of matters falling within the scope of an arbitration agreement. Erez had already commenced insolvency proceedings against Dr Bannai in the Israeli insolvency court for the recovery of sums alleged to be due to the bankrupt under an agreement between Dr Bannai and the bankrupt. Although that agreement was governed by English law and contained a London arbitration clause which it was accepted covered the claims in question, the Isreali court had refused an application by Dr Bannai to stay the insolvency proceedings pending arbitration.

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

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

In two recent cases, the High Court has considered the scope of its power, under Section 44(3) of the Act, in cases of urgency 'to make such orders as it thinks necessary for the

purpose of preserving evidence or assets': *Doosan Babcock Ltd v. Comercializadora de Equipos y Materiales Mabe Lda* [2013] EWHC 3010 (TCC) and *Zim Integrated Shipping Services Limited v. European Container KS and European Container KS 11* [2013] EWHC 3581.

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

By contrast, in *Zim Integrated Shipping Services Limited v. European Container KS and European Container KS 11* the High Court refused to order an injunction, on the application of party to ongoing arbitration proceedings, to prevent the respondents from assigning their right to hire under various charterparties, and from taking steps to terminate or purporting to terminate any of the charterparties, in particular in the event that the claimants did not make payments of hire under those charterparties. Males J said that treating the alleged contractual rights that the applicant sought to protect – namely, their right to repayment of the loans that the respondents had been refusing to pay and their right to deduct from charter hire in the event of an event of default – as 'assets' for the purposes of Section 44(3) would stretch that term to breaking point. Although the judge was prepared to accept 'with some hesitation' that the case fell within the scope of Section 44(3), the judge refused to issue the injunction. The judge reasoned that in order to make the order sought, he would first have to decide the very question that fell to be decided in the arbitration – namely, whether the applicant had the contractual rights it claimed to have. In other words, the High Court has shown itself reluctant to grant relief under Section 44(3) in circumstances where its decision would encroach upon matters to be decided by the arbitral tribunal.

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

In two recent cases, *Gujarat NRE Coke Limited and Shri Arun Kumar Jagatramka v. Coeclerici Asia (Pte) Limited* [2013] EWHC 1987 (Comm) and *Statoil v. Sonatrach* [2014] EWHC 875 (Comm), the High Court confirmed once again and in unequivocal terms that the English courts maintain a high threshold for challenging arbitral awards and will not interfere with the decisions of arbitral tribunals except in 'extreme cases'.

In *Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Limited*, Gujarat challenged an LMAA arbitral award under Section 68 of the Act, alleging in particular that the tribunal had failed in its duty under Section 33 of the Act to 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'. The parties were agreed that the correct approach was that summarised by Popplewell J in *Terna Bahrain v. Al Shamsi* [2012] EWHC

3283 (Comm). Popplewell J there said that in order to make out a case for the court's intervention under Section 68(2)(a) of the Act, the Applicant must show a breach of Section 33 of the Act amounting to a serious irregularity and giving rise to substantial injustice. Popplewell J had made clear that '[t]he test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process' and that '[a] balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the court's intervention'. Having re-confirmed this high threshold that must be satisfied for a successful challenge under Section 68 of the Act, the High Court rejected Gujarat's arguments that the tribunal had breached its obligations under Section 33, finding in fact that the tribunal had behaved 'impeccably'.

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

In *Lombard-Knight v. Rainstorm Pictures* [2014] EWCA Civ 356, the Court of Appeal gave short shrift to a challenge to the enforcement of a New York Convention Award that it found to be based on 'hollow formalism'. Rainstorm Pictures had obtained leave from the High Court on a without-notice application to enter judgment against Lombard-Knight on the same terms as an arbitral award made by the Judicial Arbitration and Mediation Service in California. Lombard-Knight successfully applied to have this order set aside, arguing that Rainstorm had not complied with the formal requirements of Section 102 of the Act by failing to provide certified copies of the arbitration agreements on which the award had been made. The matter then came before the Court of Appeal, which reinstated the original enforcement order, noting that there is no requirement in the Act for 'independent' certification; that the certification of the copy of the arbitration agreement does not go to the validity of the arbitration agreement itself; and that the question of an agreement's authenticity is different from certification. The Court of Appeal found that it was inherent in the statement of truth in the claim form, which was attached to the arbitration agreement, that the copies provided to the court were true originals. In reaching this decision, the Court of Appeal took the opportunity to stress its pro-enforcement attitude under the New York Convention, by reference to authorities including the International Council for Commercial Arbitration's (ICCA) Guide to the

Interpretation of the 1958 New York Convention: A Handbook for Judges of May 2012 edition and the academic writings on van den Berg.

***Reverberations from Dallah v. Pakistan***

In recent years, one of the English courts' more controversial arbitration-related decisions has proved to be *Dallah v. Pakistan* [2010] UKSC 46, where the Supreme Court found that the English court is bound to revisit the question of a tribunal's decision on jurisdiction if a party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made.[41] In a recent decision, *The London Steam Ship Owners Mutual Insurance Association Ltd v. the Kingdom of Spain* [2013] EWHC 2840, the High Court affirmed one aspect of the decision in *Dallah*, which it called the '*Dallah* principle', namely that 'a person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him.' The court held that the 'position was not changed by a tribunal purporting to rule that it had jurisdiction' and indeed that the *Dallah* principle is 'so fundamental that it should not be whittled down unless the interests of justice so require'. Accordingly, the English courts have shown their eagerness to preserve a party's right to challenge the jurisdiction of the arbitral tribunal, where that party has elected not to participate in arbitration proceedings. The practical consequence is that a party with strong grounds for challenging the tribunal's jurisdiction may decide not to participate in the arbitral proceedings, instead reserving its right of challenge until such time as a party seeks to enforce an adverse award.

### iii Investor–state disputes

The Convention on the Settlement of Disputes Between States and Nationals of Other States 1965 (the ICSID Convention) came into force in the United Kingdom on 18 January 1967.[42] The United Kingdom also ratified the Energy Charter Treaty 1994 on 16 December 1997.[43] In addition, the United Kingdom is currently party to 102 bilateral investment treaties (BITs).[44]

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

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

42 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

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

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

before Lisbon came into force, as well as the ability of Member States to negotiate new extra-EU BITs.

Regulation 1219/2012 confirmed that extra-EU BITs signed prior to December 2009 will remain in force until they are replaced by new treaties between the EU and the relevant third countries.[45] The Regulation required Member States to notify the Commission of any extra-EU BITs they wished to remain in force by 8 February 2013, and requires new Member States to provide notification within 30 days of their accession.[46] On 8 May 2013, the Commission published a list of the 1311 extra-EU BITs of which it had been notified by that time, of which 94 were between the United Kingdom and non-EU countries. The Commission intends to update the list every 12 months.[47] In the event, however, that the Commission considers an existing extra-EU BIT to represent a serious obstacle to the EU's negotiation of a replacement BIT, the Commission will consult with the relevant Member State to resolve the matter, which may result in the revision or termination of the relevant extra-EU BIT.[48] The Regulation is silent about the 'sunset provisions' in many extra-EU BITs, which guarantee protection for existing investments for 10 to 15 years after termination, and these provisions would appear to be unaffected by the Regulation.

The Commission will authorise the entry into force of those extra-EU BITs signed between 1 December 2009 and 9 January 2013, unless it determines that a BIT conflicts with EU law or provisions, or would constitute a serious obstacle to the EU's negotiation of a replacement BIT.[49] Member States may negotiate to enter into new, or to amend existing, extra-EU BITs.[50] However, they must notify the Commission with drafts of the provisions to be negotiated at least five months in advance,[51] and the Commission may require them to include or remove provisions in order to ensure compatibility with EU law or investment policy.[52]

45 Article 3 of the Regulation.

46 Articles 2, 3 and 5 of the Regulation.

47 Article 8 of the Regulation.

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

49 Article 12(1) of the Regulation.

50 Article 7 of the Regulation.

51 Article 8 of the Regulation.

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

## III OUTLOOK AND CONCLUSIONS

England and Wales remains one of the most frequently selected seats for international arbitration. The practical attractions of England and Wales as a seat are built not just on the firm foundation of the Act but also on judicial willingness to apply the guiding principles that underpin the Act. The willingness of the English courts to support arbitral proceedings in the jurisdiction with the various tools at their disposal – whether, as in the *Ust-Kamenogorsk* case, by restraining foreign parties from acting contrary to the terms of valid arbitration agreements; by their continued reluctance to entertain challenges of arbitral awards; or by their innovation, as in the case of *Doosan Babcock Ltd v. Comercializadora de Equipos y Materiales Mabe Lda*, in applying the provisions of the Act to new factual situations – will continue to attract parties considering whether to select England and Wales as their seat in arbitration agreements.

# Chapter 44

# UNITED STATES

*James H Carter and Claudio Salas*[1]

## I INTRODUCTION

The significant developments in US arbitration law during the past year include a US Supreme Court decision broadly endorsing judicial deference to arbitrators' rulings on important jurisdictional issues and continuing attempts by the courts to define the extent, if any, to which 'class' arbitrations, conducted by representative claimants on behalf of others on a collective basis, will find a place in US arbitral jurisprudence. Such cases arise most often in the context of consumer or franchisee cases that have few international aspects. But since US arbitration law is largely uniform in its application to both domestic and international cases, the effect of the resolution of these issues is likely to be significant for both.

This year also saw a number of decisions in which US courts enforced foreign arbitral awards, rejecting a series of defences put forward by respondents that included the government of Argentina and Russian and Mexican parties. However, there was one case in which a US appeals court reversed a lower court's enforcement of an arbitral award due to that court's lack of personal jurisdiction.

The existence of the doctrine of 'manifest disregard of the law' by the arbitrators as a ground for *vacatur* of an award remains uncertain, as federal appellate courts continue to take different positions on the matter. One federal appellate court invalidated an arbitral award on that ground, and the US Supreme Court refused a writ of *certiorari* to review the decision.

US law continues to be unsettled concerning the availability of discovery in aid of foreign private and investment arbitration tribunals; this past year, several district courts

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and one Circuit Court of Appeals approved such assistance, but one court equivocated on this issue and a district court denied assistance.

In the area of treaty arbitration, a series of NAFTA disputes involving US and Canadian pharmaceutical companies were of particular interest.

### 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 appeals 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 this year made provision for special handling of international arbitration matters in certain of their state courts. Because of the structure of US law, most cases involving international arbitration are dealt with in the federal courts.

### ii The structure of arbitration law in the US

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

The FAA's largely hands-off approach reflects US federal policy strongly favouring arbitration as an alternative to sometimes congested, ponderous and inefficient courts.[5] It was this pro-arbitration policy that led the Supreme Court to interpret an arbitration clause expansively to include statutory antitrust claims in *Mitsubishi Motors Corp v. Soler*

2 9 USC Section 2.

3 9 USC Section 3.

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

*Chrysler-Plymouth, Inc,* allowing arbitrators to enforce federal antitrust law alongside judges.[6] In the international context, this pro-arbitration policy is further evidenced by the implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Inter-American Convention on International Commercial Arbitration (the Panama Convention) in Chapters 2 and 3, respectively, of the FAA.[7]

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

### iii Distinctions between international and domestic arbitration law in the US

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

## II THE YEAR IN REVIEW

### i Developments affecting international arbitration

***The Supreme Court term***

This past term, in the much-anticipated *BG Group PLC v. Republic of Argentina* decision, the Supreme Court clarified the allocation of competence between US courts and arbitral

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

7 See Federal Arbitration Act, 9 USC Sections 201-208, 301-307.

8 See *Allied-Bruce Terminix Cos v. Dobson,* 513 US 265, 281 (1995) (holding 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 recently 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).

tribunals over jurisdictional disputes. In addition, the Court continued to develop its jurisprudence regarding the availability of class arbitration.

In *BG*, the DC Circuit decision under review had vacated an investment treaty award against Argentina based on the fact that the claimant had not fulfilled the UK–Argentina bilateral investment treaty (the Treaty) requirement that the dispute be litigated in Argentine courts for a period of 18 months before being submitted to international arbitration. In reviewing this decision, the Court considered whether local litigation requirements in bilateral investment treaties are procedural preconditions to arbitration or rather substantive conditions limiting any consent to arbitrate. Under established court precedent, 'disputes about the meaning and application of particular procedural preconditions for the use of arbitration' are for the arbitrators to decide while, absent express agreement of the parties otherwise, it is for courts to decide 'disputes about "arbitrability" [including] whether the parties are bound by a given arbitration clause'.[11] Thus, if the 18-month local litigation requirement was a procedural precondition, then the arbitral award was only subject to highly deferential review by US courts; while if the requirement was a substantive condition on the agreement to arbitrate, then the arbitral award was subject to *de novo* review by US courts.

The Court noted that under its previous jurisprudence 'procedural matters [for arbitrators to decide] include claims of waiver, delay, or a like defense to arbitrability [and] satisfaction of prerequisites such as time limits, notices, laches, estoppel, and other conditions precedent to an obligation to arbitrate.'[12] Interpreting the Treaty as a regular contract,[13] the Court found that the Treaty's local litigation requirement was like one of these procedural matters. The Court reasoned that the requirement 'determines when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all'[14] and that the 'litigation provision is consequently a purely procedural requirement – a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute.'[15] The Court then held that, under a deferential review, the arbitrators had not 'exceeded their powers' in finding that the claimant was not required to submit the dispute to local courts given certain impediments Argentina had placed on local court access.

The dissent, authored by Chief Justice Roberts, would have found that since the Treaty was between Argentina and the United Kingdom (not BG), there was no arbitration agreement between Argentina and BG unless something 'happen[ed] to create an agreement where there was none before… [T]hat something is: An investor must submit his dispute to the courts of the host country'.[16] The dissent would thus have

11 *BG Grp PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206-07 (2014).

12 Id., at 1207 (internal quotation marks omitted).

13 Id., at 1208 ('As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent.').

14 Id., at 1207 (emphasis in original).

15 Id.

16 Id., at 1216 (emphasis in original).

found that whether BG accepted Argentina's 'unilateral offer to arbitrate' by complying with the Treaty's terms was 'for a court, not an arbitrator, to decide'.[17]

The majority decision in BG was welcomed by the US arbitration community which, after the DC Circuit decision, had feared that US courts would take a more activist role in reviewing awards by international arbitration tribunals.

In addition to the BG decision, the Supreme Court issued two arbitration-related decisions this past term, both dealing with class arbitrations. These two cases built upon two other recent court decisions, *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp* and *AT&T Mobility LLC v. Concepcion*. In *Stolt-Nielsen*,[18] decided in 2010, the Court held that when an arbitration clause is 'silent' on whether class arbitration is permitted, the clause must be interpreted to bar class arbitration as a matter of binding federal law. In *Concepcion*,[19] decided in 2011, the Court held that state court decisions refusing to enforce class action waivers on state law public policy grounds that had a disproportion effect on arbitration were pre-empted by the FAA.

In *Stolt-Nielsen*, the parties had agreed that the arbitration agreement did not address the availability of class arbitration. By contrast, in *Oxford Health Plans v. Sutter*, which the Court decided this past term, 'the parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did'.[20] The question before the Court was whether the arbitrator exceeded his powers in reaching this decision.[21]

*Oxford Health Plans* concerned a dispute between an insurance company and a doctor, who brought suit on behalf of himself and a purported class of other doctors under contract with Oxford, alleging that the insurance company had failed to make full and prompt payment of claims in violation of their agreement. The arbitration clause in the agreement directed that 'no civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration'.[22] The arbitrator 'reasoned that the clause sent to arbitration "the same universal class of disputes" that it barred the parties from bringing as "civil actions" in court: The "intent of the clause" was "to vest in the arbitration process everything that is prohibited from the court process"'.[23] The arbitrator then concluded that 'a class action' was one of the civil actions that 'could be brought in a court absent the agreement' and therefore could be brought in arbitration.[24]

The Court found that because the arbitrator had interpreted the contract, his award could not be vacated on the premise that he had exceeded his powers. The FAA

17 Id., (emphasis in original).

18 559 US 662 (2010).

19 131 S. Ct. 1740 (2011).

20 *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013).

21 Section 10(a)(4) of the FAA permits vacating an award 'where the arbitrators exceeded their powers.'

22 *Oxford Health Plans*, 133 S. Ct. at 2067.

23 Id., at 2067.

24 Id. (internal quotation marks omitted).

'permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly'.[25] Therefore, an 'arbitrator's construction holds, however good, bad or ugly'.[26]

There was no dissent in the case. The concurrence suggested that, absent an express agreement (as existed in this case) by the parties that the arbitrator should decide whether the arbitration clause permits class arbitration, courts should 'pause before concluding that the availability of class arbitration is a question the arbitrator should decide'.[27] This suggestion that courts, not arbitrators, should decide whether an arbitration agreement permits class arbitration was also addressed, but not decided, in a footnote in the majority opinion:

> *We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability'.… Stolt-Nielsen made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability.… But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures.*[28]

Thus both the majority and concurring justices seemed ready to decide that it typically is for courts, not arbitrators, to determine whether an arbitration agreement permits class procedures.

The circumstances, if any, in which a party may avoid an express class waiver was the subject of the other Supreme Court case dealing with class arbitration this past term. In *American Express Co v. Italian Colors Restaurant*, a group of merchants alleged that American Express violated US antitrust law by forcing them to accept credit cards at rates approximately 30 per cent higher than rates charged by other cards. The merchants filed a class action in federal court, while American Express sought to enforce the arbitration clause in its agreements with the merchants, which prohibited class arbitration. The merchants argued that the arbitration agreement had to be invalidated because it prevented the 'effective vindication' of a federal statutory right. The merchants argued that individually their antitrust claims were not financially viable because they were worth at most US$38,549 each, while the expert analysis needed to establish the relevant markets, American Express's monopoly power, anti-competitive effects and damages could cost up to US$1 million.

The majority opinion was unsympathetic to the merchants' arguments. It noted that the exception invoked by the claimants 'finds its origin in the desire to prevent "prospective waiver of a party's right to pursue statutory remedies"'.[29] Thus the exception

25 Id., at 2070.

26 Id., at 2071.

27 Id., at 2072.

28 Id., at 2068 No. 2 (citations omitted).

29 *America Express Co v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (emphasis in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 US 614, 637 n.19 (1985)).

would invalidate 'a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.'[30] However, the majority held that 'the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy'.[31]

In a spirited dissent, Justice Kagan provided the following 'nutshell' description of the case:

> *The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability – even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.*[32]

Justice Kagan found that the majority's 'nutshell' response to this dilemma was: 'Too darn bad.'[33] The dissent would have found that the 'effective vindication' rule was broader than the majority's interpretation of the rule and that it prohibited the enforcement of an arbitration clause that 'prevents the effective vindication of federal statutory rights, however it achieves that result'.[34]

The dissent notwithstanding, the Court, in its decisions in *Concepcion* and then in *American Express*, has made it clear that arbitration clauses will be enforced as written even in contracts of adhesion. Thus, as already borne out by experience,[35] it seems likely that these contracts will in the future uniformly include arbitration agreements that prohibit class arbitration and, as a consequence, the occurrence of class arbitrations in the United States will dwindle.

***Enforcement and recognition of foreign arbitral awards***

The Southern District of New York and the Second Circuit Court of Appeals issued several significant decisions this year regarding the enforcement of arbitral awards. The courts were faced with a variety of challenges to enforcement, including claims

30 American Express Co, 133 S. Ct. at 2310-11.

31 Id., at 2311 (emphasis in original).

32 Id., at 2313.

33 Id.

34 Id., at 2314 (emphasis added).

35 A US government report released in December 2013 found that 90 per cent of consumer contracts with arbitration clauses include provisions excluding class arbitration. See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results To Date (12 December 2013) at p.13, available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

of immunity from suit, lack of due process, public policy considerations and, most interestingly, annulment at the arbitral seat.

In *Blue Ridge Investments LLC v. Republic of Argentina*, the Second Circuit affirmed the district court's enforcement of an ICSID award against Argentina. Although Argentina presented a litany of issues for appeal, the court found that it only had jurisdiction over Argentina's claims that it was immune from suit under the Foreign Sovereign Immunities Act (FSIA). The Second Circuit rejected Argentina's arguments, holding that the district court correctly found that Argentina had waived immunity from suit.

First, under the FSIA, '[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case […] in which the foreign state has waived its immunity either explicitly or by implication.'[36] The court found that Argentina had implicitly waived immunity because the ICSID convention, to which the United States and Argentina were signatories, provides that contracting states shall recognise an ICSID award 'as binding and enforce the pecuniary obligations imposed by that award within its territories as if were a final judgment of a court in that State'.[37] Thus, the court reasoned that Argentina 'must have contemplated enforcement actions' in other contracting states, including the United States.[38]

Second, the FISA also provides that:

> *[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which the action is brought … to confirm an award made pursuant to … 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.*[39]

The Second Circuit noted that to its knowledge every US court that had considered an award issued pursuant to the ICSID Convention found that the award fell within this exception to the FSIA. The Second Circuit agreed with these courts because the ICSID Convention is a treaty in force in the United States for the recognition and enforcement of arbitral awards.

The Second Circuit also addressed issues relating to jurisdiction in *Sonera Holding BV v. Çukurova Holding AS*. The court in *Sonera* found that the district court could not, consistent with due process, assert general personal jurisdiction over Çukurova – that is, jurisdiction for all purposes rather than specific jurisdiction over the underlying controversy – and enforce the underlying arbitral award. The court found that under recent Supreme Court jurisprudence, 'general jurisdiction exists only when a corporation's contacts with a state are so continuous as to render [it] essentially at home in the forum

36 28 USC Section 1605(a)(1).

37 *Blue Ridge Invs., LLC v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013).

38 Id.

39 28 USC Section 1605(a)(6).

State.'[40] The court interpreted this test to be stricter than the one previously applied by the Second Circuit, and it reversed the decision below, finding that the contact Çukurova had with New York through its affiliates was not nearly sufficient to find general jurisdiction.

In *Yukos Capital SARL v. OAO Samaraneftegaz*, the Southern District of New York court enforced an ICC award against Russian company Samaraneftegaz, rejecting due process and public policy arguments. The court noted that '[t]o establish lack of notice as a defense to enforcement under [the New York Convention], the party challenging the award must show that the arbitration procedures failed to comport with this country's standards of due process.'[41] The court found that this standard was easily met, concluding that 'Samaraneftegaz's absence was due to a decision not to appear, rather than lack of notice.'[42]

Samaraneftegaz's public policy argument was based on its contention that the loans for which Yukos Capital sought repayment had been part of a scheme by Yukos Capital to avoid Russian taxes. Samaraneftegaz argued that enforcing an award obtained on the basis of foreign tax avoidance would violate US public policy. The court rejected this argument for two reasons. First, the court found that the arbitration agreement between the parties was valid and therefore the court could not review the legality of the loans – this was a matter for the arbitrators to decide. Second, Samaraneftegaz did not identify a 'well-defined and dominant' public policy against foreign tax avoidance that could 'be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest'.[43] Thus, Samaraneftegaz could not meet the high standard associated with a public policy defence, which 'must be construed very narrowly to encompass only those circumstances where enforcement would violate our most basic notions of morality and justice'.[44]

In a novel case concerning enforcement of foreign awards this past year, *Corporación Mexicana de Mantenimiento Integral, S De RL DE CV, v. Pemex-Exploración y Producción*, the Southern District of New York was asked to determine if there could be a circumstance in which a court should enforce an arbitral award even though it had been set aside at the seat of arbitration. The award in question, rendered by an ICC arbitral panel seated in Mexico, was against Pemex-Exploración y Producción (PEP), a Mexican state-owned company. PEP contested the award in the Mexican courts, and it was ultimately set aside for public policy reasons.

Corporación Mexicana de Mantenimiento (COMMISA) sought to enforce the award in New York under the Panama Convention, which is 'largely similar' to the New

40 *Sonera Holding BV v. Çukurova Holding A.S.*, 2014 WL 1645255 at *3 (2d Cir. April 25, 2014) (internal quotation marks omitted).

41 *Yukos Capital SARL v. OAO Samaraneftegaz*, 963 F. Supp. 2d 289, 296 (S.D.N.Y. 2013).

42 Id., at 297.

43 Id., at 299.

44 Id.

York Convention, 'and so precedents under one are generally applicable to the other'.[45] Article 5(e) of the Panama Convention provides that the recognition and enforcement of an arbitral award 'may be refused' if the award was 'annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision was made'. After analysing two circuit court precedents, the district court determined that the statutory phrase 'may' gave it discretion to enforce an award annulled at the seat of arbitration, but that this discretion was narrow:

> *[I]f the judgment of nullification is repugnant to fundamental notions of what is decent and just in the United States or, stated another way, if the judgment violated any basic notion of justice in which we subscribe, then it need not be followed.*[46]

The district court then made a series of findings regarding the award and its nullification that led it to conclude that the nullification violated basic notions of justice.

First, when it initiated arbitration in 2004, COMMISA 'had every reason to believe that its dispute with PEP could be arbitrated'.[47] PEP had twice 'signed an agreement stating that the dispute related to the gas platform contracts would be arbitrated'; the arbitration clause in the agreement 'was broadly worded and mandatory'; the organic law that had created PEP gave it 'the authority to enter into such an arbitration provision'; and 'PEP's own conduct showed that it considered itself subject to arbitration' because in the litigation it waited three years to argue that Mexican public policy forbade arbitration.[48]

Second, the Mexican court that nullified the award relied primarily on a law enacted in 2009 to find that arbitration in this case violated Mexican public policy. The 2009 law provided that the 'administrative rescission [and] early termination of the contracts […] may not be subject to arbitration proceedings'.[49] The Mexican court found that the purpose of this law was 'to protect the economy and public expenditure by abandoning the practices that were aimed at granting more participation to private parties than to the State' and that therefore 'it would be contrary to public policy' to allow PEP, an important state-owned entity, to be subject to a dispute resolution procedure governed by private parties.[50]

The district court found that this retroactive application of a law violated basic notions of fairness because COMMISA had a settled expectation that its dispute with PEP could be arbitrated. Furthermore, the court found that the retroactive application of the law was meant 'to favour a state enterprise over a private party' and that this 'flouts a basic principle of justice; where a sovereign has waived its immunity and has agreed to contract with a private party, a court hearing a dispute regarding that contract should

45 *Corporacion Mexicana de Mantenimiento Integral, S De RL DE CV v. Pemex-Exploracion y Produccion,* 962 F. Supp. 2d 642, 653 (S.D.N.Y. 2013).

46 Id., at 657 (internal quotation marks omitted).

47 Id.

48 Id., at 657-58.

49 Id., at 658.

50 Id.

treat the private party and the sovereign as equals'.[51] Furthermore, the court found that the retroactive application of the 2009 law left COMMISA without a forum in which to litigate the dispute. The district court concluded as follows:

> *At the time COMMISA brought its claims against PEP, there was no statute, case law, or any other source of authority that put COMMISA on notice that it had to pursue its claims in court, instead of in arbitration. COMMISA reasonably believed that it was entitled to arbitrate the case, and the Eleventh Collegiate Court's decision disrupted this reasonable expectation by applying a law and policy that were not in existence at the time of the parties' contract, thereby denying COMMISA an opportunity to obtain a hearing on the merits of its claims. The decision therefore violated basic notions of justice, and I hold that the Award in favor of COMMISA should be confirmed.*[52]

### *Arbitrability*

Under a long line of cases, including *Granite Rock Co v. International Brotherhood of Teamsters*,[53] whether parties have agreed to arbitrate a particular dispute ('arbitrability' under US law) is typically an issue for judicial determination. Under the 'separability' doctrine, an arbitration clause is separable from the underlying contract, allowing arbitral tribunals to decide whether the underlying contract is valid even though the arbitration agreement itself is a piece of the challenged contract.[54] These cases separate the question of the validity of the arbitration clause from all other issues related to the agreement, including validity of the overall agreement. Once an arbitration clause is deemed to have been properly entered into, other claims related to the contract containing the clause are referred to arbitration.

The Second Circuit recently applied this rule in *Duran v. Hass Group, LLC* with respect to a forum selection clause contained within an arbitration agreement. The forum selection clause called for arbitration in Maricopa County, Arizona. Duran, while not challenging the arbitration agreement and conceding that the contract called for all disputes to be submitted to arbitration, argued that the forum selection clause was unconscionable. The Second Circuit held that this was a procedural issue presumptively for the arbitrator to decide. In a footnote, the court stated that in its view this was a strange result:

51 Id., at 659.

52 Id., at 661.

53 130 S. Ct. 2847 (2010). For a thorough overview of competence-competence, including arbitrability, under US law see Born, International Commercial Arbitration 1124-1206 (2014).

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

> *By requiring arbitration over the validity of the forum selection clause to proceed pursuant to the terms of that forum selection clause, we may well be enforcing an invalid – and, indeed, unconscionable – contract. Even if the arbitrator ultimately decides that the merits of the dispute should not be arbitrated in Arizona, a round of arbitration will already have occurred in Arizona pursuant to the invalid forum selection clause. One might even wonder whether, in that scenario, we would have invented our own contractual terms, inasmuch as the parties would never have had a valid contract to arbitrate in Arizona.*[55]

Despite exceeding the logical limits of the arbitrability analysis by refusing to have the courts consider the unconscionability of a forum selection clause within a valid arbitration clause, the court concluded that this result was compelled by binding precedent of the Supreme Court and its own circuit.

A more straightforward result was reached in *Gwathmey Siegel Kaufman & Assoc. Architects LLC v. Rales*. Gwathmey claimed that the agreement was vague concerning whether issues of arbitrability were delegated to the arbitrators and that therefore the court should determine arbitrability. The Second Circuit rejected Gwathmey's argument. Because the agreement incorporated the American Arbitration Association (AAA) rules, it was not ambiguous with regard to who decides arbitrability. The AAA rules provide that '[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.'[56] The court applied the Second Circuit rule that when 'parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator'.[57]

***Eliminating court review of arbitral awards under Section 10 of the FAA***

This past year the Ninth Circuit decided a novel issue regarding court review of arbitral awards: whether parties could agree to eliminate all federal court review of arbitration awards, including review under Section 10 of the FAA. The parties in *In re Wal-Mart Wage and Hour Employment Practices Litigation* agreed to submit any disputes 'to binding, non-appealable arbitration'.[58] The court found that this phrase could be interpreted to mean that federal courts were not to review the merits of an award but also could be interpreted to mean that federal courts could not review an award on any grounds, including the Section 10 grounds for *vacatur*. The court did not decide which was the correct interpretation of the agreement, since it held that the second interpretation would be unenforceable. The court found that a textual analysis of the FAA 'forecloses a contractual arrangement to eliminate review under its terms' because a 'federal court "must" confirm an arbitration award unless, among other things, it is vacated under

55 *Duran v. J. Hass Grp., L.L.C.*, 531 F. App'x 146, 147 n.1 (2d Cir. 2013).

56 *Gwathmey Siegel Kaufman & Assocs Architects, LLC v. Rales*, 518 F. App'x 20, 21 (2d Cir. 2013).

57 Id., at 21.

58 *In re Wal-Mart Wage & Hour Emp't Practices Litig*, 737 F.3d 1262, 1265 (9th Cir. 2013).

Section 10.'[59] The court noted that '[t]his language carries no hint of flexibility and does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else'.[60] The court added:

> *Permitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration. Through Section 10 of the FAA, Congress attempted to preserve due process while still promoting the ultimate goal of speedy dispute resolution.*[61]

***Non-statutory grounds for vacatur of awards***

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

The manifest disregard doctrine was born from Supreme Court dicta in 1953: '[T]he interpretations of the law by the arbitrators in contrast to manifest disregard [of the law], are not subject, in the federal courts, to judicial review for error in interpretation'.[62] Over the years since, this passive reference grew in the lower courts into what was commonly considered an additional ground for *vacatur* of arbitral awards, at least in a domestic context, where arbitrators wilfully ignore clearly applicable law in reaching an erroneous result.[63] 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*

59 Id., at 1267-68.

60 Id., at 1268 (internal quotation marks omitted).

61 Id.

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

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

> *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.*[64]

While this criticism of manifest disregard is itself merely dicta, the Court was clearly sceptical of merits-based review that threatened to turn arbitration into a mere 'prelude' to a 'more cumbersome and time-consuming judicial review process'.[65] It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived Hall Street.[66]

As a result of the Supreme Court's lack of clear direction, a circuit split has arisen over the continuing vitality of the manifest disregard doctrine post-*Hall Street*. The Fifth, Eighth and Eleventh Circuits (which include much of the American South) have interpreted *Hall Street* as an express rejection of the manifest disregard doctrine.[67] 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.[68] Both circuits have found that a high standard must be met for the doctrine to apply.[69] In

64 *Hall St. Assocs., LLC v. Mattel, Inc*, 552 US 576, 585 (2008) (citations omitted). See also Born, *International Commercial Arbitration* 2639–46 (2009) (discussing Hall Street and 'manifest disregard' under the FAA).

65 Id., at 588 (citation omitted).

66 *Stolt-Nielsen S.A.*, 559 US at 672, n.3.

67 See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) ('Hall Street unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA […]. Thus, to the extent that manifest disregard of the law constitutes a non-statutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.') (citations omitted); *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1271 (11th Cir. 2009) (Hall Street 'confirmed [… that Sections] 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award'). The Eighth Circuit has stated that it had 'previously recognized the holding in Hall Street and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA'. *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010). Lower courts have interpreted this statement as a repudiation of manifest disregard. See *Jay Packaging Grp., Inc. v. Mark Andy, Inc.*, 2011 WL 208947, at *1 (E.D. Mo. 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'.).

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

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

addition, the Fourth Circuit has ruled that the manifest disregard doctrine is still viable,[70] while the Seventh Circuit stated that 'manifest disregard of the law is not a ground on which a court may reject an arbitrator's award unless it orders parties to do something that they could not otherwise do legally (e.g., form a cartel to fix prices)'.[71] The Sixth Circuit recently found that in addition to the grounds provided by the FAA, a court can vacate an arbitral award 'in the rare situation in which the arbitrators "dispense [their] own brand of industrial justice," by engaging in manifest disregard of the law.'[72] Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence since *Hall Street*.[73]

This past year the Supreme Court had an opportunity to clarify the status of the manifest disregard doctrine but declined to do so when it denied *certiorari* in the case *Dewan v. Walia*.[74] In *Dewan*, the Fourth Circuit held that in addition to the grounds of the FAA, there are permissible common law grounds for vacating an award, which 'include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law'.[75] The court then found that an arbitrator manifestly disregarded the law when she interpreted a release of liability to cover only claims brought in federal or state court and not claims brought in arbitration. The court stated that '[t]he plain language of the Release fatally undermines the suggestion that

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

71 *Johnson Controls, Inc. v. Edman Controls Inc.*, 2013 WL 1098411, at *4 (7th Cir. Mar. 18, 2013) (internal quotation marks omitted).

72 *Physicians Ins Capital v. Praesidium Alliance Grp.*, 2014 WL 1388835, at *2 (6th Cir. Apr. 10, 2014). The Sixth Circuit note that manifest disregard is a 'limited review.' Id. ('A mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established precedent. As long as a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. It is only when no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.') (internal quotation marks omitted).

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

74 *Walia v. Dewan*, No. 13-722, 2014 WL 1343626 (US Apr. 7, 2014) (denying certiorari).

75 *Dewan v. Walia*, 544 F. App'x 240, 245-46 (4th Cir. 2013).

Walia retained the right to bring any of his counterclaims in arbitration.'[76] The Fourth Circuit's holding seems difficult to reconcile with Justice Kagan's instruction in *Oxford Health Plans* that if an arbitrator is arguably interpreting a contract such interpretation must be accepted whether 'good, bad or ugly'. Nevertheless, as a result of the Supreme Court's decision not to review the case, the manifest disregard doctrine will continue to exist in some jurisdictions in the US for the foreseeable future.

***Emergency arbitrators***

In recent years, several institutional rules have added clauses providing for emergency arbitrators. The revised 2010 ICC rules, for example, include an appendix of emergency arbitrator rules that permit a party to seek emergency measures from an emergency arbitrator on an expedited basis.[77] As discussed below, the AAA has recently updated its rules regarding emergency arbitrators.

In a case this past year, *Yahoo! Inc. v. Microsoft*, the Southern District of New York court examined the powers of an emergency arbitrator, appointed pursuant to the AAA's prior rules, to order final relief. The parties had agreed that Yahoo! would transition search traffic from its electronic communication system to Mircrosoft's Bing system. This transition took place in all of the relevant markets except Taiwan and Hong Kong, in which Yahoo! said it would halt the transition for a period of time because of concerns it had about Microsoft's commitment to the Bing system.

The parties' agreement provided for the arbitration of disputes, and the parties had agreed that 'with respect to claims for interim, injunctive or emergency relief […] an Emergency Arbitrator will be appointed pursuant to Rule O-1 of the AAA Emergency Measures of Protection'.[78] When Microsoft learned of Yahoo!'s decision not to proceed with the planned transition, it initiated an emergency arbitration. The AAA appointed an emergency arbitrator, who directed a proceeding involving intensive briefing and testimony. The emergency arbitrator found that Yahoo! had breached the parties' agreement by halting the transition, that it was critical to the success of the enterprise for the transition to be completed, and that not doing so would cause Microsoft irreparable harm. The arbitrator issued an injunction enjoining Yahoo! from 'continuing any pause in the transition' and commanding it to use all efforts to complete the transition by certain dates.

Yahoo! sought *vacatur* of the award on the ground that the arbitrator had exceeded his authority. Yahoo! argued that in essence the arbitrator's injunctive relief constituted final relief and that under the parties' agreement the arbitrator was only empowered to give 'interim relief', which Yahoo! defined as 'relief necessary to preserve the status quo until the matter can be fully and fairly decided by a three-arbitrator panel of industry

76 Id., at 248.

77 2010 ICC Arbitration Rules, Appendix V (as of 1 January 2012). See also, e.g., SCC Arbitration Rules, Appendix II (as of 1 January 2010).

78 *Yahoo! Inc v. Microsoft Corp*, 2013 WL 5708604, at *3 n. 3 (S.D.N.Y. Oct. 21, 2013), appeal withdrawn (2 January 2014).

experts following discovery'.[79] Yahoo! argued that the relief the arbitrator provided was final because the transition required was irreversible.

The court approached the issue as it would have the decision of any arbitrator: '[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the district court must uphold the arbitrator's award.'[80] The court found that the agreement suggested that the emergency arbitrator was empowered 'to grant non-monetary relief necessary to restore the status quo'.[81] The court found that restoring the status quo 'may appropriately require one party to perform contractual obligations [and therefore] the arbitrator had a colourable basis for concluding that an injunction requiring Yahoo! to continue to perform […] was necessary'.[82] In sum, as long as an emergency arbitrator arguably construes a contract and arguably acts within the authority granted by the contract, his or her award will be upheld by US courts even if the relief granted is final.

Yahoo! also claimed the emergency arbitrator had manifestly disregarded the law because he failed to find that Microsoft faced irreparable harm and that it was likely to succeed on the merits. The court rejected this argument, finding that Yahoo! could not identify a clear rule of law that the arbitrator ignored or refused to apply. Indeed, the court held that the arbitrator had made appropriate findings regarding irreparable harm, balance of hardships and success on the merits.

***Arbitrator disclosure***

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

Under Section 10(a)(2) of the FAA, an arbitral award should be vacated if the arbitrator(s) displayed 'evident partiality'. US federal courts will not easily vacate awards on this ground, especially in circuits like the Second Circuit where the standard is interpreted to mean that 'a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'[83] In *Ometto v. ASA Bioenergy Holding A.G.*, the Second Circuit upheld a district court ruling that there was no 'evident partiality' when an arbitrator failed to disclose that his colleagues were providing legal advice in corporate transactions where one of the parties in the arbitration was on the other side. While the arbitrator may have been careless in not checking conflicts again once the

79 Id., at *4.

80 Id., at *5 (internal quotation marks omitted).

81 Id.

82 Id.

83 *Ometto v. ASA Bioenergy Holding A.G.*, 2014 WL 43702, at *1 (2d Cir. 7 January 2014) (emphasis added).

arbitration had begun, 'that carelessness does not rise to the level of willful blindness'.[84] The Second Circuit made clear that the threshold for disqualifying arbitrators is higher than for judges, 'who can be disqualified in any proceeding in which his impartiality might reasonably be questioned'.[85]

In *PK Time Group, LLC v. Robert*, PK Time sought interlocutory removal of the arbitrators, claiming that they were partial because certain procedural rulings had been unfair to PK Time and two of the arbitrators spoke at a conference where the other side's expert witness also spoke. The district court found that under Second Circuit precedent the interlocutory removal of arbitrators was not permitted and, even if it were, PK Time's allegations of bias were wholly unsupported. The procedural rulings in question were 'standard procedural rulings, well within the discretion of the Arbitrators in the control of the proceedings'.[86] The speculated interaction between the arbitrators and the expert witness was also insufficient to warrant disqualification. Indeed, a party's undisclosed relationship with an arbitrator that is 'peripheral, superficial or insignificant' does not warrant the *vacatur* of an award because 'if the courts were to disqualify every arbitrator who has had professional contacts with a party or witness, it would be difficult to maintain the arbitration system'.[87]

In *FDIC v. IIG Capital LLC*, the interaction between the sole arbitrator and counsel for one of the parties also was not sufficient as a basis to set aside the award because of evident partiality. The allegation of bias was based on the arbitrator's failure to disclose the following contacts with counsel: the arbitrator, who was the director of an arbitration programme at American University, had hired the lawyer as a faculty member for the 2010 summer program, the arbitrator and lawyer 'were two of the three founding members of the International Chamber of Commerce's Latin American Arbitration Group in 2003 and may still be members', and they were 'founding members of the Latin American Arbitration Association'.[88] The Eleventh Circuit had no trouble finding that these professional contacts were 'the kind […] that one would expect of successful lawyers active in the specialized area' and could not give the arbitrator 'motive for using his decision to curry [the lawyer's] favor'.[89]

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

84 Id.

85 Id. (emphasis in original).

86 *PK Time Grp., LLC v. Robert*, 2013 WL 3833084, at *3 (S.D.N.Y. 23 July 2013).

87 Id., at *4.

88 *FDIC v. IIG Capital LLC*, 525 F. App'x 904, 905 (11th Cir. 2013).

89 Id., at 906.

90 '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).

> *(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.*[91]

Older cases suggested that a foreign arbitration did not fall within the statute's purview, which was thought only to include foreign judicial proceedings.[92] 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.[93] 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".'[94] The Court also relied on a definition of tribunal that included arbitral tribunals.[95]

Since *Intel*, courts have split on whether Section 1782 permits discovery in aid of a foreign arbitration. The key issue has been whether a foreign arbitration constitutes a 'proceeding in a foreign or international tribunal' for purposes of the statute. This past year, district courts differed on this question; at the circuit level, the Seventh Circuit suggested that international arbitration does fall within the statute, and the Eleventh Circuit backtracked on this issue when it vacated *sua sponte* a prior decision in which it had granted discovery in aid of international arbitration. In that case, *Application of Consorcio Ecuatoriano de Telcomunicaciones*, the Eleventh Circuit substituted a new decision that granted discovery but without reaching the question whether Section 1782 encompasses international arbitration.

In *Application of Consorcio Ecuatoriano de Telcomunicaciones*, the applicant, CONECEL, sought discovery in aid of proceedings in Ecuador against former employees and a vendor who allegedly conspired to overbill CONECEL for transportation services. CONECEL advanced two theories to justify its discovery application: the evidence was

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91 *In re Consorcio Ecuatoriano de Telecomunicacions SA*, 2014 WL 104132, at *5 (11th Cir. 10 January 2014).

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

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

94 Id., at 248-49.

95 Id., at 258.

to be used in a future proceeding in Ecuadorean courts against its former employees, and the evidence was to be used in an ongoing arbitration against the vendor. While in its prior decision the Eleventh Circuit had found that the arbitration counted as a 'proceeding in a foreign or international tribunal', the court now found that it did not need to address this question because a 'reasonably contemplated foreign proceeding' in a foreign court, such as the potential suit against CONECEL's employees, satisfies Section 1782.[96]

While the Eleventh Circuit's view is now uncertain on the issue, the Seventh Circuit suggested in passing this year that a district judge would be authorised by Section 1782 to provide discovery in aid of an arbitration in Germany.[97] A district court in Colorado, which allowed Ecuador's discovery requests for use in its UNCITRAL arbitration versus Chevron,[98] and a district court in New Jersey, which allowed discovery to be used in a NAFTA arbitration,[99] agreed with the Seventh Circuit. In the New Jersey case, the district court concluded, without much analysis, that in accordance 'with the Supreme Court's exposition of Section 1782 in *Intel* a majority of courts have found that an international arbitration proceeding conducted pursuant to UNCITRAL rules constitutes a "foreign or international tribunal" for the purposes of the statute'.[100]

A California district court came to the opposite conclusion, finding that 'private arbitrations do not fall within the meaning of "foreign or international tribunal" under Section 1782' for two reasons.[101] First, the court found that the Supreme Court in *Intel* did not mean to expand the meaning of 'foreign or international tribunal' to include private arbitration but instead had been focused on whether the term includes 'quasi-judicial agencies' such as the European commission.[102] Second, the court accepted the policy argument that applying Section 1782 to 'private contractual arbitrations would defeat the timeliness and cost-effectiveness of arbitration, and would place a heavy burden on the federal courts to determine discovery requests'.[103]

***Arbitrators' discretion in fashioning remedies and sanctions and determining evidentiary procedure***

Several cases this past year confirmed an arbitrator's discretion to determine arbitral procedures and to award remedies. In *Timegate Studios Inc v. Southpeak Interactive LLC,* the Fifth Circuit found that an arbitrator did not exceed his powers in awarding both monetary damages and a perpetual licence. In that case a video games publisher, Timegate, and a video games developer, Southpeak, entered into an agreement to create and market a video game called Section 8. The parties' relationship fell apart when the

96 *In re Consorcio Ecuatoriano de Telecomunicaciones SA*, 2014 WL 104132, at *5-*6.

97 *GEA Grp AG v. Flex-n-Gate Corp,* 740 F.3d 411 (7th Cir. 2014).

98 *Republic of Ecuador v. Stratus Consulting, Inc*., 2013 WL 2352425 (D. Colo. 29 May 2013).

99 *In re Mesa Power Grp*, LLL, 2013 WL 1890222 (D.N.J. 19 April 2013).

100 Id., at *5.

101 *In re Dubey,* 949 F. Supp. 2d 990, 993 (C.D. Cal. 2013).

102 Id., at 993-94.

103 Id., at 995.

game did not sell well, and in the ensuing arbitration the arbitrator found that the game developer had engaged in a litany of contract breaches and fraudulent behaviour. The arbitrator determined that while money damages could compensate Southpeak for past harm, they could not compensate for its having been deprived 'of the opportunity to exploit the potential opportunities offered by other iterations, distribution channels, and sequels of Section 8'.[104] The arbitrator awarded Southpeak a perpetual licence that dissolved the parties' initial roles as developer and publisher and provided each with 'the right to unilaterally create derivative Section 8 merchandise and property' and dissolved the parties' obligations 'to report, share, and distribute revenues from Section 8 […], permitting each party to pursue Section 8 commercial activities independently'.[105] The district court vacated the award, finding that the perpetual licence was 'inconsistent with the fundamental purpose of the contract'.[106]

In its reversal of the district court decision, the Fifth Circuit noted that arbitral awards are reviewed under a highly deferential standard: 'an arbitrator has not exceeded his powers unless he has utterly contorted the evident purpose and intent of the parties.'[107] Moreover, 'the arbitrator's selection of a particular remedy is given even more deference than his reading of the underlying contract. The remedy lies beyond the arbitrator's jurisdiction only if there is no rational way to explain the remedy […] as a logical means of furthering the aims of the contract.'[108] Under this deferential standard, the Fifth Circuit found that the perpetual licence was the arbitrator's attempt to restore the fundamental goal of the contract: 'mutual access to financial benefits derived from their joint creation and distribution of Section 8'.[109] The court found that it was reasonable for the arbitrator to conclude that the contractual relationship had been so harmed by Timegate's actions that the parties could not fruitfully continue the relationship and that the perpetual licence was necessary to permit each party to pursue game marketing efforts separately.

In *Seagate Tecnology, LLC v. Western Digital Corp.*, the Minnesota Court of Appeals upheld an arbitrator's sanction for the fabrication of evidence.[110] The arbitrator found that one of the parties had fabricated a document in an effort to prove that certain trade secrets at issue had been publicly disclosed. The arbitrator sanctioned the party by precluding it from presenting any evidence or defence with respect to these trade secrets and entering an award against the party, finding it liable for the misappropriation and use of the trade secrets. The arbitrator awarded US$525 million plus interest. A lower state court vacated the award, finding that the arbitrator did not have authority to impose sanctions for the fabrication of evidence and that, if he had such authority, he should have considered lesser sanctions. The Court of Appeals disagreed, finding that 'a

104 *Timegate Studios, Inc v. Southpeak Interactive, LLC*, 713 F.3d 797, 801 (5th Cir. 2013).

105 Id., at 801.

106 Id., at 801-02.

107 Id., at 802-03.

108 Id., at 803 (internal quotation marks omitted).

109 Id.

110 The case was analysed under Minnesota's arbitration law, but the court found that the result would not have differed if the FAA had been applied.

broadly worded arbitration agreement, with no limiting language to the contrary, confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith.'[111] Moreover, the applicable AAA rules permitted the arbitrator to grant any remedy or relief that would have been available if the parties had brought the case in court, and the parties did not dispute that the sanction imposed would have been available in court.

US courts will give arbitrators wide latitude not only in fashioning remedies, but also in determining what evidence to consider. In *LJL 33rd Street Associates, LLC v. Pitcairn Properties, Inc*, for example, the Second Circuit rejected the district court's finding that in refusing to consider hearsay evidence an arbitrator was guilty of misconduct in violation of Section 10(a)(3) of the FAA (which requires *vacatur* of an award when 'the arbitrators were guilty of misconduct in refusing to […] hear evidence pertinent and material to the controversy'). The Second Circuit recognised that 'an arbitrator's unreasonable exclusion of pertinent evidence, which effectively deprives a party of the opportunity to support its contentions, can justify vacating the award',[112] but found that the arbitrator in this case did not unreasonably refuse to consider the evidence in question. The Second Circuit reasoned that the fact that arbitrators are not bound by the rules of evidence does not mean that 'arbitrators are prohibited from excluding hearsay evidence, especially when (a) the evidence could be presented without reliance on hearsay and (b) its hearsay nature is unfairly prejudicial to the adversary'.[113]

Section 10(a)(3) of the FAA was also at issue in *Doral Financial Corp v. Garcia Velez*. Doral argued that the arbitral tribunal was guilty of misconduct due to its failure to grant a party's subpoena requests. The First Circuit rejected this argument, noting that under Section 10(a)(3) '*vacatur* is appropriate only when the exclusion of relevant evidence so affects the right of a party that it may be said that he was deprived of a fair hearing'.[114] The First Circuit found that this high standard was not met beause Doral had an adequate opportunity to argue why subpoenas were warranted even though the deadline for requesting information had passed, the hearings were underway and the relevant witness had already testified. Moreover, the tribunal provided ample written support for its decision to deny the subpoenas.

In *Bain Cotton Co v. Chestnut Cotton Co*, the Fifth Circuit likewise refused to vacate an award due to the arbitrators' handling of discovery requests. The plaintiff argued that the arbitrators denied repeated discovery requests and then summarily condemned the plaintiff for not providing evidence to support its claims, even though such evidence was not in the plaintiff's control and the arbitrators had refused discovery. The Fifth Circuit found that while it might have reversed a similar result in litigation, reversal was not warranted because 'judicial review of an arbitration award is extremely narrow'.[115]

111 *Seagate Tech, LLC v. W Digital Corp*, 834 N.W.2d 555, 563 (Minn. Ct. App. 2013).

112 *LJL 33rd St Assocs, LLC v. Pitcairn Props Inc*, 725 F.3d 184, 194 (2d Cir. 2013).

113 Id.

114 *Doral Fin Corp v. Garcia-Velez,* 725 F.3d 27, 31-32 (1st Cir. 2013).

115 *Bain Cotton Co v. Chesnutt Cotton Co*, 531 F. App'x 500, 501 (5th Cir. 2013).

### ii Arbitration developments in Congress and the states

A variety of measures potentially affecting arbitration law are introduced each year in the US Congress, but few of them proceed through committee consideration to become actual legislation. Most of the proposals address perceived risks to consumers or employees from compulsory arbitration agreements and are not directed primarily towards commercial disputes, but often the wording of the bills would extend to international commercial arbitrations as well. During the past year, none of these legislative proposals resulted in any change in existing law, even as the rhetoric became quite heated.[116]

Perhaps of more potential impact on arbitration are laws passed by state legislatures prohibiting the use of foreign law in legal disputes. These laws, while seemingly born out of animus against shariah law, sometimes are neutrally worded as targeting 'foreign law' generally, to avoid being struck down as unconstitutionally discriminatory against American Muslims. Such laws have been enacted in Oklahoma, Kansas, Louisiana, Tennessee and Arizona, and some other states seem poised to pass similar measures. These laws, broadly interpreted, could cause confusion and disorder when US courts confirm, enforce, or otherwise become involved with arbitrations governed by foreign law. Groups such as the Anti-Defamation League, the Brennan Center for Justice and the American Bar Association have spoken out against laws seeking to eliminate the use of 'foreign law' in the US legal system.[117] There have been no reported decisions in which such a state law actually was considered relevant to an international arbitration-related case.

### iii Investment treaty cases involving the US or US nationals

This year has seen interesting developments in several NAFTA arbitrations involving Canada and the US and pharmaceutical companies of each country. In September 2013, Eli Lilly and Company filed a notice of arbitration against Canada, challenging a common law rule (the 'promise doctrine') developed by Canadian courts for the evaluation of patents' utility.[118] Canadian courts have retroactively applied the 'promise doctrine' to invalidate two of Eli Lilly's patents due to inutility. Eli Lilly claims in the

116 Senator Al Franken, in introducing Senate Bill 878, the 'Arbitration Fairness Act of 2013,' stated: 'Giant corporations now can use arbitration clauses to stifle enforcement of federal laws – the antitrust laws, the minimum-wage laws, the civil rights law; you name it. As the law has gotten worse, the need for reform has become more obvious and more urgent. I introduced the arbitration fairness act to undo some of the damage that we've seen to the civil justice system.' U.S. Senate Committee on the Judiciary Hearing (17 December 2013) (Statement of Senator Franken).

117 The Brennan Center has published a comprehensive report on this issue. See Faiza Patel, Matthew Duss, and Amos Toh, Foreign Law Bans: Legal Uncertainties and Practical Problems (May 2013) available at www.brennancenter.org/publication/foreign-law-bans-legal-uncertainties-and-practical-problems.

118 *Eli Lilly and Co v. Government of Canada*, NAFTA, UNCITRAL, Notice of Arbitration (Sept. 12, 2013).

arbitration that this doctrine violates Canada's obligations under NAFTA and the Patent Cooperation Treaty.

In two earlier arbitrations, the roles were reversed: a Canadian pharmaceutical company, Apotex Inc, brought NAFTA claims against the US. In the first of these arbitrations, in which Apotex claimed that US court decisions prevented it from promptly bringing generic drugs to the US market in violation of NAFTA standards of treatment, the tribunal this past year issued an award on jurisdiction and admissibility dismissing the case. The tribunal's key finding was that Apotex had not made an 'investment' in the United States for purposes of NAFTA. The tribunal found that Apotex's 'formulation, development and manufacture of the pharmaceuticals in issue does not qualify [as an investment], since these are all activities conducted outside the United States'.[119] Moreover, the applications Apotex submitted to get FDA approval for its products were not investments because, among other reasons: (1) the activity of preparing the submissions happened outside the United States; (2) a submission's preparation 'does not establish that a generic drug manufacturer is investing in, rather than exporting products to, the Unites States'; and (3) while the submissions could be considered property, they could not be an 'investment' if they are merely applications for permission to export that support cross-border sales.[120] In sum, the tribunal found that 'Apotex's activities […] are those of an exporter, not an investor'.[121]

Before this decision was issued, Apotex had filed a second NAFTA arbitration against the United States.[122] In that arbitration, Apotex claims that import restrictions on its products imposed by the United States due to concerns about Apotex manufacturing facilities violated NAFTA standards of treatment. This arbitration also may consider whether Apotex has made investments in the United States.

### iv New AAA Arbitration Rules and Optional Appellate Arbitration Rules

Effective 1 October 2013, the AAA implemented revised Commercial Arbitration Rules. They include changes intended to make arbitrations more efficient. We highlight four of these changes.

#### *Preliminary hearing*

New Rule 21 provides for a preliminary telephonic or in-person hearing, held at the arbitrator's discretion, 'where the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute'. Notably, the rule instructs that the 'parties should be invited to attend the preliminary hearing along with their representatives'.

119 *Apotex Inc v. Government of the United States of America*, NAFTA, UNCITRAL, Award on Jurisdiction and Admissibility (14 June 2013) Section 176.

120 Id., at Sections 187-88, 208.

121 Id., at Section 244.

122 *Apotex Holdings Inc and Apotex Inc v. Government of the United States of America,* NAFTA, UNCITRAL, Request for Arbitration (29 February 2012).

***Dispositive motions***
New Rule 33 provides for dispositive motions: 'The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.'

***Emergency measures of protection***
Under the prior version of the rules, emergency measures were optional and had to be agreed on expressly in an arbitration clause or agreement. Now the emergency rules are part of the Commercial Rules and are applicable unless excluded. A party may seek emergency relief by notifying the AAA and the other party, and within one business day of notice 'the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications.' The emergency arbitrator must within two days establish a schedule for the emergency proceedings. Subsequently, if 'the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief […] the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.'

***Chairperson's discovery rulings***
New Rule 44 provides that 'absent the objection of a party or another panel member, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel'.

The AAA has also introduced new Optional Appellate Arbitration Rules, effective 1 November 2013. These new rules seek to provide parties who elect to use them with a streamlined, standardised, appellate arbitration procedure. These rules provide for a standard of review that is more expansive than that allowed by existing federal and state statutes to vacate an award. The rules 'anticipate an appellate process that can be completed in about three months, while giving both sides adequate time to submit appellate briefs. The rules permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.'[123] The AAA anticipates that these rules will be used in 'the types of large, complex cases where the parties agree that the ability to appeal is particularly important'.[124]

Finally, effective 1 May 2014, the AAA amended the international mediation and arbitration rules of its International Centre for Dispute Resolution (ICDR). The new rules include provisions for multiparty and multi-contract issues and, like the Commercial Rules, will provide for emergency measures of protection before the constitution of the tribunal. Unlike other institutions, which have discretion to refuse an application for

123 AAA Optional Appellate Arbitration Rules, Introduction, available at http://go.adr.org/AppellateRules.

124 AAA Press Release, 1 November 2013 available at http://go.adr.org/AppellateRules.

an emergency arbitrator, the ICDR will appoint an emergency arbitrator shortly upon receipt of a party's written application.

With respect to disclosure, the new ICDR rules adopt the approach of the IBA Rules on the Taking of Evidence in International Arbitration, allowing parties to request specific documents or categories of documents in the other party's possession 'reasonably believed to exist and to be relevant and material to the outcome of the case'. The parties can depart from this procedure only upon 'written agreement and in consultation with the tribunal'. In addition, the new disclosure rules make it clear that US discovery procedures such as depositions and interrogatories are 'generally not appropriate' in an ICDR arbitration.

### v Opening of the New York International Arbitration Center

The New York International Arbitration Center (NYIAC) was formed in 2012 to promote the conduct of international arbitration in New York by, *inter alia*, offering dedicated office space, state-of-the-art technology and other support, and by developing programmes and materials about international arbitration in New York, the application of New York law in international arbitration, and the recognition, enforcement and implementation in New York of arbitral awards. In July 2013 the NYIAC opened its centre for the conduct of international arbitration at 150 East 42 Street, one block from Grand Central Terminal. The NYIAC does not administer arbitrations or provide rules for the conduct of arbitration.

## III OUTLOOK AND CONCLUSIONS

The past year has been a busy time for the development of arbitration law in the United States, with the Supreme Court's *BG* decision and continuing developments in class arbitration the most widely discussed issues. As a large country with a high volume of international arbitration, the US generates case law that sometimes shows differences among the various circuit courts in one aspect or another of the law. The continuing development of that law nevertheless takes place in the presence of a highly favourable judicial attitude towards international arbitration.

## Appendix 1

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Mr Speller is an English barrister. He has represented clients in numerous institutional and *ad hoc* arbitrations, sited in both common and civil law jurisdictions, including Austria, England, France, Germany, Hong Kong, New York, Singapore, Sweden and Switzerland. Mr Speller also has substantial experience of international commercial litigation in both the English Court of Appeal and in the commercial and chancery divisions of the High Court. He has particular experience of litigation concerning aviation, oil and gas, insurance and reinsurance, telecommunications, banking and competition law issues.

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