The International Arbitration Review

Fourth Edition

Editor
James H Carter

Law Business Research

The International Arbitration Review

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For further information please email
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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 2013

Chapter 15

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 consolidated and reformed the existing law, introducing a modern and 'pro-arbitration' legislative regime. The Act is based in large part on the UNCITRAL Model Law, but also differs from the UNCITRAL Model Law in important respects.

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. In practice, this means that practitioners must consult the common law as well as the Act to determine the status of the law on many issues.

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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.

i The structure of the Act

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

a Part I contains the key provisions relating to arbitration procedure, including the appointment of the arbitral tribunal, the conduct of the arbitration, and the powers of the tribunal and the court. Section 4 of Part I expressly distinguishes between those provisions that are mandatory (i.e., those that have effect notwithstanding any agreement to the contrary) and those that are non-mandatory (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,[6] which were recently described as the 'philosophy behind the Act'[7] by a member of the Departmental Advisory Committee on Arbitration ('DAC'), which had helped draft the Act in consultation with arbitration practitioners and users.[8] Section 1 of the Act sets out these principles and provides that Part I is 'founded on' them and shall be 'construed accordingly'.

These 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');[9]

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');[10] and

---

6 Section 1 of the Act.

7 See Lord Mustill, 'Reflections on the English Arbitration Act 1996 after fifteen years', Chartered Institute of Arbitrators, 2012.

8 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., *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 at paragraph 80).

9 Section 1(a) of the Act.

10 Section 1(b) of the Act.

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').[11]

The general principles create a starting point for judicial reasoning and innovation in the application of the Act. In a string of recent cases, the English courts continue to refer to the guiding principles in resolving disputes as to how the Act should be interpreted and applied.[12]

iii The scheme of the Act

The provisions of the Act give expression to these guiding principles. 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'[13] 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'.[14]

Party autonomy is reinforced by the non-mandatory nature of most of the provisions of Part I, these being default rules applicable only in the absence of the parties' agreement to the contrary.[15] The courts have, in their turn, emphasised the importance of party autonomy to the arbitral process in a number of judgments. Most recently, the Supreme Court in *Jivraj v. Hashwani*[16] upheld an arbitration clause requiring 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.[17] In that judgment, their Lordships approved the following statement of the International Chamber of Commerce ('ICC'):

> *The raison d'être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (eg because neither party will submit to the*

11 Section 1(c) of the Act.

12 *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.

13 Section 40 of the Act.

14 Section 33(1) of the Act.

15 See Section 4 of the Act.

16 [2011] UKSC 40.

17 Employment Equality (Religion or Belief) Regulations 2003.

> *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).*[18]

The mandatory provisions of Part I, which apply notwithstanding any agreement to the contrary, include those providing limited rights of challenge of an award. Awards may be challenged on the basis that the tribunal lacked substantive jurisdiction (under Section 67 of the Act) or on grounds of serious procedural irregularity (under Section 68). However, these provisions are designed to support the arbitral process and reflect the third principle of the Act – namely, limited court intervention.[19] The tribunal has substantial powers to decide all procedural and evidential matters,[20] to give directions in relation to property or the preservation of evidence,[21] and to order relief on a provisional basis.[22] By contrast, 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[23] and summoning witnesses to appear before the tribunal),[24] and 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.[25] In this respect, the Act mirrors the UNCITRAL Model Law.[26]

In addition, the court is empowered to hear challenges to arbitrators[27] and applications to set aside awards.[28] For their part, the courts have tended to place a 'high hurdle' on parties seeking to set aside arbitral awards,[29] insisting that such challenges are

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

19 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').

20 Section 34 of the Act.

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

22 Section 39 of the Act.

23 Section 18 of the Act.

24 Section 43 of the Act.

25 Section 44 of the Act.

26 Section 17 J of the UNCITRAL Model Law.

27 Section 39 of the Act.

28 Sections 67, 68, 69 of the Act.

29 *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.'

'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'.[30] Challenges of awards on the grounds of serious procedural irregularity under Section 68, unlike appeals on points of law under Section 69, do not require leave. It has been suggested that this looser requirement has encouraged frivolous litigation. However, 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.[31]

iv Court relief in support of arbitration

A consistent theme in recent case law has been the affirmation and application by the English courts of their power to make orders in support of arbitrations seated in England and Wales. The High Court of Justice 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.[32]

v Applications under the Act

Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act,[33] 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. The LCIA continues to develop new rules and expects that these will be submitted to the LCIA Court for approval towards the latter half of 2013.

In 2011, a total number of 224 disputes were referred to the LCIA for arbitration.[34] The nature of the contracts seen in the 2011 referrals to the LCIA remained diverse, ranging from emissions trading and sponsorship of sporting events, to oil exploration

30 *Lesotho Highlands Development Authority v. Impregilo SpA and Others* [2005] UKHL 43.

31 www.olswang.com/articles/2013/03/do-the-2012-stats-reveal-an-abuse-of-the-right-to-challenge-an-arbitral-award-for-serious-irregularity/.

32 *BNP Paribas SA v. Open Joint Stock Company Russian Machines & Joint Stock Asset Management Company Ingosstrakh-Investments* [2011] EWHC 308 (Comm).

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

34 LCIA Director General's Report 2011, www.lcia.org/LCIA/Casework_Report.aspx.

and the sale and purchase of commodities.[35] Commodity transactions (especially in steel and carbon products) made up 13 per cent of 2011 referrals, as against 6 per cent in 2010. An increase was also seen in loan or other financial agreements, including guarantees, with these constituting 17.5 per cent of 2011 referrals, compared with 11.5 per cent in 2010.[36] There was a decrease in the number of arbitrations concerning joint venture and shareholders' agreements, which accounted for 13 per cent of LCIA referrals in 2011, as opposed to 23 per cent in 2010.

The LCIA appointed 325 arbitrators to a total of 151 tribunals, again slightly down from the 168 tribunals established by the LCIA in 2010.[37] In LCIA arbitrations, 2011 also saw a preference for a three-member tribunal as opposed to a sole arbitrator, and a shift towards party nomination.[38] 52 per cent of arbitrators were selected by parties in 2011.[39]

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 the second most chosen seat of arbitration under ICC rules in 2011, with 62 cases.[40] In addition, English law was the second most popular choice by parties (10.7 per cent) of the 84 per cent of cases registered in 2011 where parties had included a choice-of-law clause in the contract relating to their dispute.[41]

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 2011, the LMAA made 3,555 appointments, and 3,849 in 2012.[42] 592 awards were also rendered under LMAA rules in 2011, with an increase to 631 awards in 2012.[43]

ii Arbitration developments in the English courts

In 2012 and 2013 the English courts once again witnessed a significant inflow of arbitration-related cases.

The West Tankers saga

The year has seen two important developments in the long-running *West Tankers* saga. The underlying dispute involving West Tankers is between the insurers of voyage

35 LCIA Director General's Report 2011, www.lcia.org/LCIA/Casework_Report.aspx.
36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
40 ICC 2011 Statistical Report.
41 Ibid.
42 www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.
43 Ibid.

charterers of the vessel *The Front Comor* and its owners about responsibility for a collision that occurred during the voyage charter. The charter party contained an arbitration agreement under which all disputes arising out of the charter were to be referred to arbitration in London with English law to apply. The owners commenced arbitration in London against the insurers pursuant to the terms of the charter party, but the insurers commenced proceedings against the owners in the Italian courts in Sicily in relation to the same proceedings.

The owners obtained an anti-suit injunction from the Commercial Court restraining the insurers from pursuing the Italian court proceedings. This decision was appealed to the House of Lords, which in turn referred to the European Court of Justice ('ECJ') the question whether it was consistent with Regulation 44/2001 ('the Regulation') for the court of a Member State to make an order restraining a person from continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement. The ECJ concluded that an anti-suit injunction would be inconsistent with the Regulation.

There has been extensive commentary on whether the inability of the English courts to grant an anti-suit injunction in these circumstances would diminish the appeal of London as a seat (particularly compared to seats where the courts could still grant anti-suit injunctions in the same circumstances, such as Hong Kong and Singapore).[44] However, in two recent decisions in 2012, the English courts have confirmed that practical recourse may remain available to a party faced with a breach of an agreement to arbitrate.

West Tankers round one

The owners applied to the Commercial Court in London for an order enforcing the arbitral award and converting it to a judgment under Section 66 of the Act.[45] The court granted the order because the owners' objective was to establish the primacy of the declaratory award over the potentially inconsistent judgment, and the order sought would make a positive contribution to securing the material benefit of the award.

The Court of Appeal upheld this decision on appeal, reasoning that Field J's interpretation of Section 66 is closer to the purpose of the Act. The decision reflected the pro-arbitration attitude of the English courts:

> *Ultimately the efficacy of any award by an arbitral body depends on the assistance of the judicial system, as Lord Hobhouse observed. Judges may give force to an arbitral award by a number of means, including by applying the doctrine of issue estoppel [...] As with any judgment or award, so in the case of a monetary judgment or award its enforcement is the enforcement of the right (a right to payment) which the award has established. In the present case, as in Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co of Zurich [2003] 1 WLR 1041, the owners want to enforce the award through* res judicata*, and for that purpose they seek to have the award entered as a judgment.*

44 The Brussels I Regulation recast, S.L.T. 2011, 7, 31-35; Arbitration and anti-suit injunctions in the EU, L.Q.R. 2009, 125 (Jul), 365-369.

45 *West Tankers Inc v. Allianz SpA (The Front Comor)* [2011] EWHC 829 (Comm).

In the event that the Italian court issues a judgment irreconcilable with the English judgment on the arbitral award, the insurers may seek to enforce that judgment in the English court against the owners. The English court would then be faced with, on the one hand, an enforceable judgment of the English court and, on the other, the later conflicting judgment of the Italian court that normally it would be bound to enforce under the Regulation. The Court of Appeal did not determine which judgment would prevail in those circumstances. As discussed further below, however, recent revisions to the Regulation may answer this question.

The High Court decision was followed in *African Fertilizers and Chemicals NIG Ltd v. BD Shipsnavo GmbH & Co Reederei KG.*[46] Beatson J characterised submissions that declaratory relief should not be available as 'inimical to the underlying policy considerations in this area' and pointed to the observation in Briggs' *Civil Jurisdiction and Judgments* at paragraph 7.22 that: 'once an English court has given leave to enforce an arbitral award, it would be gravely damaging to legal certainty for it to be required to recognise and enforce a foreign judgment which undermined or contradicted that arbitral award.'[47]

West Tankers round two

In the second *West Tankers* decision,[48] the High Court considered an appeal under Section 69 of the Act against a further award issued by the arbitral tribunal. The owners of *The Front Comor* had sought to recover damages for losses suffered as a consequence of the insurers initiating proceedings in Italy in breach of the arbitration agreement. The tribunal considered that while the Regulation did not apply to arbitration by virtue of Article 1, the principle of effectiveness, or effective judicial protection, protecting insurers' right to sue the operator in Italy under Article 5(3) circumscribed its jurisdiction to grant damages for breach of the obligation to arbitrate or an indemnity.

The High Court overturned this decision on the basis that arbitration fell outside the Regulation and an arbitral tribunal was thus not bound to give effect to the principle of effective judicial protection. The court observed that the Attorney General in the ECJ *West Tankers* case recognised the possibility of conflicting decisions on the merits between an arbitral tribunal and a national court.[49]

These two decisions have important practical consequences for a party faced with proceedings in another EU state that it believes to be in breach of an agreement to arbitrate. Post-*West Tankers*, it will not be open to that party to seek an anti-suit injunction. However, the party can claim declaratory relief and/or damages from the arbitral tribunal (under the *West Tankers* round two analysis discussed above) and can then seek to enforce that award in the English courts. In principle, this conclusion appears consistent with the recent changes to the Regulation discussed below and also provides a party with a practical remedy.

46 [2011] EWHC 2452 (Comm).

47 Paragraph 28(c).

48 See [2012] EWHC 854, Paragraph 25 (Comm).

49 [2012] EWHC 854, Paragraph 54 (Comm).

Recent revisions to the Regulation

In December 2012, after many years of consultation, a recast of the Regulation was published in the Official Journal of the European Union ('the recast Regulation'). The recast Regulation will be applied by Member State courts from 10 January 2015, two years after it comes into force. As was the case under the Regulation, the recast Regulation will not apply to arbitration.[50]

The recast Regulation expressly acknowledges the issues that flared up in the *West Tankers* saga. The explanatory memorandum to the proposed amended Regulation says:

> *[t]he interface between arbitration and litigation needs to be improved. Arbitration is excluded from the scope of the Regulation. However, by challenging an arbitration agreement before a court, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings which may lead to irreconcilable resolutions of the dispute. This leads to additional costs and delays, undermines the predictability of dispute resolution and creates incentives for abusive litigation tactics.*

The recast Regulation attempts to resolve this tension by making expressly clear in Recital 12 that the New York Convention 'takes precedence over this Regulation'.[51] Recital 12 also confirms that the Regulation should not apply to any action or judgment concerning the review, appeal, recognition or enforcement of an award. This would suggest that a court can refuse to enforce a judgment from another EU Member State conflicting with an arbitral award on the basis that its New York Convention obligations take precedence. On that ground, the court could potentially refuse to enforce the judgment under the public policy exception in the Regulation itself.

The recast Regulation, once effective, should provide useful clarity as to the steps an English court can take in respect of an action in the courts. In circumstances where a party commences proceedings in an EU Member State in breach of an arbitration agreement, the English court will remain unable to issue an anti-suit injunction by virtue of the decision of the European Court of Justice in the *West Tankers* case. However, the English court will be able to recognise and enforce an arbitral award (including an arbitral award granting declaratory relief or damages in respect of a breach of the agreement to arbitrate) under the recast Regulation. Most importantly, the recognition and enforcement of such an arbitral award should, in principle, take precedence over a conflicting judgment of a court of another EU Member State.

If this is correct, the recast Regulation may provide a party in these circumstances with the same outcome as would have been achieved by an anti-suit injunction, albeit by a more circuitous route. In practice anti-suit injunctions do not actually stop foreign proceedings but expose a party breaching them to remedial measures (e.g., damages) in the English courts. A party could obtain similar remedial measures by enforcing an arbitral award (although it would, of course, first have to jump through the additional hoop of obtaining such an arbitral award).

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50 Recital 12.

51 This is further reinforced by a new Article 84(1)(a), expressly stating that the Regulation shall not affect the application of the New York Convention.

Ust-Kamenogorsk

In *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC*,[52] the Court of Appeal was asked to decide whether the English courts can issue anti-suit injunctions in order to protect arbitration agreements at a time when there are no arbitral proceedings under way and none are intended.

The underlying dispute here 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. 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 sought and 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.[53]

The owner appealed to the Court of Appeal. By this time, the parties had agreed that the claim for further information before the Kazakhstan Economic Court should be withdrawn. However, the operator remained concerned that this claim might be reinstated in Kazakhstan, or some other claim made in breach of the arbitration agreement. It was accepted by all parties that there were no arbitration proceedings under the arbitration clause contemplated.[54]

Before the Court of Appeal, the principal and most extensively argued issue was whether the court had jurisdiction to grant a declaration or an anti-suit injunction in a situation where there was no actual, proposed or intended arbitration. The Court of Appeal dismissed the appeal and upheld the injunction.

In striking that balance, the Court of Appeal concluded that it had a broad jurisdiction to grant an anti-suit injunction under Section 37 of the SCA, even though it was accepted by all parties that there was no jurisdiction under Section 44 of the Act. Section 37 gives the courts power to issue injunctions 'in all cases in which it appears to the court to be just and convenient to do so'. The Court of Appeal decision confirms, therefore, the willingness of the English courts to intervene in order to restrain a party from bringing tactical litigation in breach of an agreement to arbitrate in England.

The Court of Appeal's decision has been appealed to the Supreme Court and is listed for a hearing beginning on 1 May 2013.

U&M Mining Zambia Ltd v. Konkola Copper Mines Plc[55]

In *U&M Mining Zambia Ltd v. Konkola Copper Mines Plc*, the High Court considered whether the English court, and the English court alone, had the power to grant interim

52 [2011] EWCA Civ 647.

53 *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm).

54 Paragraph 16.

55 [2013] EWHC 260 (Comm).

relief in respect of arbitrations seated in England and Wales. The dispute was between two Zambian companies, and arose out of mining contracts governed by Zambian law and providing for LCIA arbitration in London. Konkola obtained *ex parte* injunctive relief from the Zambian court under Zambia's Arbitration Act, asserting that it intended to protect its contractual rights pending LCIA arbitration in London. U&M then commenced an LCIA arbitration in London and applied for an anti-suit injunction restraining Konkola from taking further steps in the Zambian proceedings.

The Court refused the injunction, referring in particular to Article 25.3 of the LCIA Rules which, by expressly stipulating that the power of the arbitral tribunal to order interim and conservatory measures is not to prejudice a party's right to apply to a state court before the formation of the arbitral tribunal, implicitly recognises the party's right to do so.[56] The court also found that the natural forum for such proceedings was Zambia rather than England, so far as judicial assistance by way of interim measures was required, pending the appointment of the arbitrators.[57]

***Yukos Capital SARL v. OJSC Rosneft Oil Company*[58]**

The decision of the Court of Appeal in *Yukos Capital SARL v. OJSC Rosneft Oil Company*[59] shows the willingness of the English courts to entertain the enforcement of an arbitral award pursuant to the New York Convention, even where the award has been set aside at the seat. This is likely to be viewed as a welcome development by award creditors seeking to enforce awards against counterparties in England, including where those counterparties have funds flowing through the London market.

In *Yukos Capital SARL v. OJSC Rosneft Oil Company*[60] the Court of Appeal enforced four Russian arbitral awards that had previously been set aside by the courts of Russia, where the arbitration had been seated.

The Russian Arbitrazh courts had set aside the awards in May 2007. Yukos, before seeking leave to enforce these awards in the English courts under Section 101 of the Act and the New York Convention, had already enforced the awards in the Netherlands under Dutch law and the New York Convention. In its decision to grant leave to enforce the awards, the Dutch Court of Appeal had found that the Russian proceedings were 'not impartial and independent but [had been] guided by the interests of the Russian state and [had been] instructed by the executive'.[61] Rosneft resisted enforcement of the award in England by referring to the act of state doctrine, which precludes an English court from sitting in judgment on the sovereign acts of a foreign government or state within its territory.

56 Paragraph 68.

57 Paragraph 71.

58 [2012] EWCA Civ 855.

59 Ibid.

60 Ibid.

61 Ibid., Paragraph 21 (the English Court of Appeal quoting the Dutch Court of Appeal judgment).

There were therefore two distinct issues before the English Court of Appeal. First, whether Yukos' claims alleging abuse of process in the Russian annulment actions were barred by the act of state doctrine. Yukos alleged that the Russian court had engaged in an unlawful conspiracy to destroy Yukos through its tax authorities and court system. Here, the Court of Appeal held for the first time that the act of state doctrine does not apply to allegations of impropriety against foreign court decisions, whether in the case of particular decisions or in the case of a systemic dependency on the dictates or interference of the domestic government.[62] Where a foreign court acts in a way that is an abuse of its own responsibilities as a court of law, the English courts are not obliged to give effect to the potential jurisdiction or past acts of such foreign court, provided that the failings of the foreign court are sufficiently cogently brought home to the English court.[63]

The second issue was whether Rosneft was issue estopped by the decision of the Dutch Court of Appeal from disputing that the Russian proceedings were 'partial and dependent'. The Court of Appeal, reversing the decision of the High Court, held that the issues before the two courts were different and thus no issue estoppel could arise: whereas the Dutch court had determined whether the Russian annulment decisions were 'partial and dependent' by considerations of Dutch public order, the English court had to determine this question by reference to English public policy.

The English courts have historically been reluctant to set aside foreign arbitral awards on the grounds of public policy and indeed have held that the pro-enforcement bias in the New York Convention is itself a matter of English public policy.[64] *Yukos Capital SARL v. OJSC Rosneft Oil Company* takes this pro-enforcement approach one, or arguably two, steps further by confirming that the English courts will apply English public policy even where the award has been set aside at the seat and even where the courts in another jurisdiction have applied their own (possibly different) conceptions of public policy.

Sulamérica SA v. Enesa Engelharia SA[65]

The judgment of the Court of Appeal in *Sulamérica* provides helpful guidance on the approach the English courts will apply in determining the proper law of an arbitration agreement in a commercial contract.

In *Sulamérica*, the Court of Appeal considered whether Brazilian or English law governed an arbitration agreement, in circumstances where the underlying contract (an insurance policy) contained an express choice of Brazilian law as the governing law, an exclusive jurisdiction clause in favour of Brazilian courts, and a multi-tiered dispute resolution clause providing for mediation and arbitration with London as the seat. The

62 Ibid., Paragraph 73.

63 Ibid., Paragraph 90.

64 *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd the Convention* [1999] 2 Lloyd's Rep 65 (CA). In that case, there were allegations of corruption but these were rejected by the arbitral tribunal and the courts in Switzerland, where the arbitration was seated, had rejected an application to set aside the award. The English court enforced the arbitral award.

65 [2013] 1 WLR 102 (CA).

court found that English law, as the law of the seat providing the necessary supporting and supervisory jurisdiction, had the 'closest and most real connection' to the arbitration agreement.

The Court proposed a three-stage inquiry in determining the proper law, these stages to be considered separately and in the following order: express choice; implied choice; and closest and most real connection.

As there was no express choice of law governing the arbitration agreement, the court moved directly into the implied choice or closest and most real connection analysis. The Court reasoned that this analysis should start 'from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law'.[66] As there was an express choice of substantive law in favour of Brazilian law, the assumption was in favour of Brazilian law.[67] The court also mentioned two further factors in favour of Brazilian law, namely that there was an exclusive jurisdiction clause choosing Brazilian courts and the contract has a close commercial connection to Brazil.

However, the Court ultimately found that the arbitration agreement's closest and most real connection was with English law. The choice of London as the seat of the arbitration, the Court found, 'inevitably imports an acceptance that the law of the country relating to the conduct and supervision of arbitrations will apply to the proceedings'.[68] The Court suggested that this factor also supported the inference that the parties intended English law to govern all aspects of the arbitration agreement, including matters on formal validity and jurisdiction of arbitrators. The Court also found that there was a serious risk that the arbitration agreement will be found invalid under Brazilian law, since under Brazilian law arbitration agreements are only enforceable with the parties' consent.[69]

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.[70] The United Kingdom also ratified the Energy Charter Treaty 1994 on 16

66 Ibid., Paragraph 11 (CA).

67 Ibid., Paragraph 26 (CA) ('A search for an implied choice of proper law to govern the arbitration agreement is therefore likely […] to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion.').

68 Ibid., Paragraph 29 (CA).

69 Ibid., Paragraph 30 (CA).

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

December 1997.[71] In addition, the United Kingdom is currently party to 102 bilateral investment treaties ('BITs').[72]

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

Regulation 1219/2012 confirmed that extra-EU BITs signed prior to December 2009 will remain in force until they are replaced by new treaties between the EU and the relevant third countries.[73] 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.[74] The Commission will publish a list of the BITs of which it has been notified by 8 May 2013, and update this list every 12 months.[75] The list has not yet been published. 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.[76] 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.[77] Member States may negotiate to enter into new, or to amend existing, extra-EU BITs.[78] However, they must notify the Commission with drafts of the provisions to be negotiated at least five months in advance,[79] and the Commission may require them to include or remove provisions in order to ensure compatibility with EU law or investment policy.[80]

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

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

73 Article 3 of the Regulation.

74 Articles 2, 3 and 5 of the Regulation.

75 Article 8 of the Regulation.

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

77 Article 12(1) of the Regulation.

78 Article 7 of the Regulation.

79 Article 8 of the Regulation.

80 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.

2012 was perhaps a less controversial year for the English courts than 2011 (in which the Supreme Court overturned the Court of Appeal's much-debated decision in *Jivraj v. Hashwani*[81]). Recent court decisions have confirmed the willingness of the English courts to intervene in support of arbitration.

The steps the English courts can take to restrain parties from bringing foreign proceedings in breach of an agreement to arbitrate continue to be a focal point of judicial attention. The possible resolution of some of the lingering uncertainties from the *West Tankers* saga – both through case law and the introduction of the recast Regulation – are to be welcomed. These changes should provide greater clarity in the steps that English courts can, and cannot, take where proceedings are commenced in another EU state in alleged breach of an agreement to arbitrate. The impending appeal to the Supreme Court in the *Ust-Kamenogorsk*[82] case may resolve remaining disputes as to the scope of the jurisdiction of the English courts to grant anti-suit injunctions to restrain parties from bringing proceedings in courts outside the EU.

The Court of Appeal judgment in the *Yukos Capital SARL*[83] reflects the continuing emphasis the English courts give to the primacy of their enforcement obligations under the New York Convention. This underscores the attractions of England and Wales as a venue for the enforcement of arbitral awards, even of awards issued in arbitrations seated outside England and Wales.

81 [2011] UKSC 40.

82 [2011] EWCA Civ 647.

83 [2012] EWCA Civ 855.

Chapter 45

UNITED STATES

James H Carter and Claudio Salas[1]

I INTRODUCTION

The significant developments in US arbitration law during the past year include a continuing attempt 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 governments of Peru, Argentina and Thailand.

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. However, in cases where the defence was permitted to be raised, as usual the courts rejected its availability in practice.

US law continues to be unsettled concerning the availability of discovery in aid of foreign private and investment arbitration tribunals; but in what may be a sign of the direction in which the law is developing, one Circuit Court of Appeals approved such assistance in a case of 'first impression', and other courts within that circuit have followed.

In the area of treaty arbitration, a series of disputes involving US investors in Ecuador broke new ground.

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

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

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

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2 9 USC Section 2.

3 9 USC Section 3.

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

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

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

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

iii Distinctions between international and domestic arbitration law in the US

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

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The Supreme Court term

This past term, in a *per curiam* opinion in *Nitro-Lift Technologies, LLC v. Howard*, the Supreme Court once again affirmed the FAA's 'national policy favoring arbitration' and concluded that in light of this policy, '[i]t is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation.'[11] In *Nitro-Lift*, the Court rejected the Oklahoma Supreme Court's assertion that an 'underlying contract's validity is purely a matter of state law for state-court determination' and confirmed its established jurisprudence holding that 'when parties commit to arbitrate contractual

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).

11 *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012).

disputes, it is a mainstay of the [FAA's] substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved "by the arbitrator in the first instance, not by a federal or state court".'[12]

While *Nitro-Lift* was the Court's only arbitration decision after February 2012, the Court heard oral arguments in the spring of 2013 in two cases regarding class arbitration, which at the time of publication had not yet been decided. In recent terms the Supreme Court has seemed intent on shutting the door on the possibility of class arbitration. In *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp*,[13] 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 *AT&T Mobility LLC v. Concepcion*,[14] decided in 2011, the Court held that state court decisions refusing to enforce class action waivers on state law public policy grounds were pre-empted by the FAA. The lower courts, however, have resisted the demise of class arbitration, and the two cases the Court heard this term will clarify the meaning and scope of *AT&T Mobility* and *Stolt-Nielsen*.

One month before the issuance of the *AT&T Mobility* opinion, the Second Circuit Court of Appeals had issued a decision denying enforcement of a class action waiver provision in the *In re American Express Merchants*' litigation, where a group of small merchants sought to arbitrate federal antitrust claims against American Express as a class.[15] In its initial opinion, the Second Circuit held that the class action waiver was unenforceable because the merchants proved that a class action was the only cost-effective method to vindicate their statutory antitrust rights.[16] The Supreme Court granted American Express's request for review and immediately remanded the case to the Second Circuit for reconsideration.[17] On remand, the Second Circuit declined to revise its holding, noting that nothing in *Stolt-Nielsen* altered its initial conclusion that 'the cost of plaintiffs' individually arbitrating their dispute with [American Express] would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.'[18]

Following the *AT&T Mobility* decision, the Second Circuit reviewed its prior decision in light of the latest Supreme Court pronouncement and again declined to

12 Id., at 503 (quoting *Preston v. Ferrer*, 552 US 346, 349 (2008)).

13 130 S. Ct. 1758 (2010).

14 131 S. Ct. 1740 (2011).

15 *Italian Colors Rest. v. Am. Express Travel Related Servs. Co.* (*In re Am. Express Merchants Litig.*), 554 F.3d 300 (2d Cir. 2009), cert. granted, judgment vacated and remanded, 130 S. Ct. 2401 (2010).

16 554 F.3d at 315–17 (noting expert's opinion that it would be economically irrational for a merchant to arbitrate its antitrust claims individually, since its likely damages would be dwarfed by the expense of an economic antitrust study).

17 See *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

18 634 F.3d 187, 197–198 (2d Cir. 2011).

reverse its initial conclusion that the waiver was unenforceable.[19] In its prior decision on remand, the Court of Appeals had framed its decision as one involving competing federal policies: the FAA's liberal policy in favour of arbitration on one hand and, on the other, the policy allowing individuals to assert federal statutory rights under federal antitrust rules. In considering the Supreme Court's analysis in *AT&T Mobility*, the Second Circuit narrowly construed the decision to apply only where a state contract law is entirely preempted by the FAA.[20] It reiterated its prior ruling that the question before it was 'whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims'.[21] Based on the evidence before it, the Second Circuit again determined that the costs of individually litigating federal antitrust claims in arbitration would be prohibitive and that, under these circumstances, a judicial class action was the only method by which plaintiffs could vindicate their statutory claims.[22] It therefore directed the district court to deny the defendants' motion to compel arbitration. The Second Circuit was careful to note, however, that its decision should not be construed to stand for the proposition that 'class action waivers in arbitration agreements are *per se* unenforceable, or even that they are *per se* unenforceable in the context of antitrust actions'.[23] Instead, the circumstances of each case are to be weighed to determine whether waiving class actions effectively deprives individuals of their federal statutory rights.

It is important to note the factual circumstances in the Second Circuit's opinion that provided the court with what it considered a distinction from *AT&T Mobility*: the alleged conflict of two federal policies. Courts regularly hold that state law cannot preempt the FAA under *AT&T Mobility*.[24] Whether the FAA takes precedence in the face of competing federal policies, however, will be definitively established in the Supreme Court's decision in *American Express Merchants*.

In the second of the two current cases, the Court's *Stolt-Nielsen* decision will be revisited in S*utter v. Oxford Health Plans LLC*.[25] In that case, a panel of the Court of Appeals for the Third Circuit upheld an arbitrator decision to allow class arbitration

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19 *Italian Colors Rest. v. Am. Express Travel Related Servs. Co.* (*In re Am. Express Merchs. Litig.*), 667 F.3d 204 (2d Cir. 2012).

20 Id., at 213.

21 Id., at 214.

22 Id., at 219.

23 Id.

24 As the Third Circuit decision in *Homa v. American Express* held, 'a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration is desirable for unrelated reasons.' *Homa v Am. Express Co.*, 494 F. App'x 191, 195–96 (3d Cir. 2012) (quoting *Litman v. Cellco P'ship*, 655 F.3d 225, 231 (3d Cir. 2011); See also *Kilgore v. Keybank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012) (rejecting California's rule against arbitration of public injunctive claims); *Quillon v. Tenet Healthsystem Philadelphia, Inc.*, 673 F.3d 221 (3d Cir. 2011) (rejecting Pennsylvania law that deemed certain class action waivers to be unconscionable).

25 675 F.3d 215 (3d Cir. 2012).

despite the contract's silence on its permissibility. The arbitration clause at issue provided that no civil action concerning any disputes could be brought in court and that all such disputes shall be submitted to final and binding arbitration.[26] The Third Circuit ruled that an arbitrator did not exceed his powers by determining that the phrase 'all such disputes' encompassed class disputes. The court noted that '*Stolt-Nielsen* did not establish a bright-line rule that class arbitration is allowed only under an arbitration agreement that incants "class arbitration" or otherwise expressly provides for aggregate procedures'.[27] Because the arbitrator had articulated a contractual basis for consolidating disputes – the broad language of this specific arbitration clause – he had not exceeded his powers by interpreting contracts to include class arbitration. The Third Circuit noted a similar outcome in *Jock v. Sterling*,[28] where the Second Circuit ruled that an arbitrator had not exceeded her authority under the agreement by ruling that the arbitration agreement allowed the plaintiffs to pursue class arbitration, even though the agreement lacked an express provision permitting it.

Both the Second Circuit and the Third Circuit emphasised the fact that in *Stolt-Nielsen* the parties had stipulated that there was no agreement – explicit or implicit – on class arbitration in the contract, a point that was not expressly stipulated in the cases before them. While the Supreme Court had ruled that 'an implicit agreement to authorize class-action arbitration […] is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate,'[29] both the Second Circuit and Third Circuit concluded that an implicit agreement could be found in other general language in the arbitration clause.

In a similar case post-dating *Jock v. Sterling*, the Fifth Circuit expressly disagreed with the reasoning of the Second Circuit. In *Reed v. Florida Metropolitan University*, the Fifth Circuit found that the arbitrator had exceeded his powers in permitting class arbitration on the basis of broad language, the terms 'any dispute' and 'any remedy,' in the arbitration clause. The Fifth Circuit read *Stolt-Nielsen* to require courts to ensure that an arbitrator has a legal basis for his class arbitration determination.[30] It added that '[s]uch an analysis necessarily requires some consideration of the arbitrator's award and rationale' and criticised the *Jock* majority for confirming an award that 'based its conclusion in part upon the agreement's failure to expressly prohibit class arbitration, a rationale that is incompatible with *Stolt-Nielsen*'.[31]

Since the arbitration clause in issue in *Stolt-Nielsen* did not differ markedly from those in *Sutter v. Oxford Health Plans* and *Jock v. Sterling*, it remains to be seen what will be the result of appellate courts' pattern of decisions when arbitrators rely on general language as the basis for an implicit agreement to permit class arbitration.

26 Id., at 217.

27 Id., at 222.

28 *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir. 2011).

29 *Stolt-Nielsen S.A.*, 130 S. Ct. at 1775.

30 *Reed v. Florida Metro. Univ., Inc.*, 681 F.3d 630, 645 (5th Cir. 2012).

31 Id.

Other class arbitration decisions

The Second Circuit was not the only court this past year which sought to distinguish the Supreme Court's ruling in *AT&T Mobility* and permit class arbitrations. The West Virginia Supreme Court of Appeals, West Virginia's highest court, revisited its 2011 decision in *Brown v. Genesis Healthcare Corp*,[32] which the Supreme Court had reversed and remanded in 2012, and once again found that the class waiver at issue was unenforceable.

In the case's first iteration, *Marmet Health Care Center, Inc v. Brown*,[33] the Supreme Court had vacated the West Virginia Court's ruling that held unenforceable all pre-dispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes. The West Virginia Court had ruled that, as a matter of public policy, the state of West Virginia did not permit binding arbitration of these claims if the arbitration agreement was entered into before the claim arose. Relying on its decision in *AT&T Mobility*, the Supreme Court reversed and reaffirmed that 'when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA'.[34] It rejected the West Virginia Court's attempt to carve out an exception to this rule and remanded the case for determination of whether an alternate ground proffered for the state court's refusal to compel arbitration could be sustained under common law principles not specific to arbitration and not pre-empted by the FAA.

Upon reconsideration, the West Virginia Court reaffirmed that the arbitration clauses in the nursing home contracts at issue may be unenforceable as unconscionable under generally applicable state law principles.[35] In a procedural move that will delay any further trip back to the Supreme Court, however, the West Virginia Court remanded the case to the trial court to permit the plaintiffs to develop the evidentiary record on unconscionability, which may insulate a future decision of the Court finding the arbitration clauses at issue unconscionable from another reversal at the Supreme Court.

In *DR Horton v. Cuda*, another case finding an exception to *AT&T Mobility* this past year, the National Labor Relations Board ('NLRB') determined that the right to file class actions was a 'concerted activity' protected by the National Labor Relations Act ('NLRA') and that a private contract that purports to eliminate this substantive statutory right by mandating individual arbitration would be in conflict with and unenforceable under the NLRA. The NLRB distinguished a certified union's relinquishing a substantive statutory right in the course of a negotiation from 'an employment policy […] imposed on individual employees by the employer as a condition of employment'.[36] This case has been appealed to the Fifth Circuit Court of Appeals, and its reasoning has been thrown into doubt by a recent decision by the Eighth Circuit. In *Owen v. Bristol Care* the Eighth Circuit suggested, without much analysis, that there was no conflict between a class

32 724 S.E.2d 250 (W. Va. 2011).

33 *Marmet Health Care Ctr., Inc. v. Brown,* 132 S. Ct. 1201 (2012).

34 Id., at 1203 (quoting *AT&T Mobility*, 131 S. Ct. at 1747).

35 *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217 (W. Va. 2012).

36 *In re D. R. Horton, Inc.*, 357 NLRB No. 184, at *13 (3 January 2012).

waiver and the NLRA.[37] Further clarity on this point will need to await the decision of the Fifth Circuit.

Enforcement and recognition of foreign arbitral awards

The federal district courts and courts of appeal issued several significant decisions this year regarding the enforcement of foreign arbitral awards. The courts were faced with a variety of challenges to enforcement, including questions of award ambiguity, personal jurisdiction, *forum non conveniens* and foreign sovereign immunity.

US courts can remand an arbitral award to the tribunal when the award is ambiguous or fails to address a later contingency. However, the award must be 'so ambiguous that the court is unable to discern how to enforce it'.[38] As shown by the recent case *Duke Energy v. Peru*,[39] this is a difficult standard to meet. In *Duke Energy*, Peru paid the principal amount of an ICSID award against it, but the parties disagreed on the appropriate interest. In an award issued in August 2008, the tribunal in the underlying arbitration had provided that the interest would be 'calculated using the actual interest rate(s) stipulated for that period' by the Peruvian tax authorities ('SUNAT'), clarifying that this was 'the interest rate(s) SUNAT credits to taxpayers on tax refunds'.[40] The law specifying the interest rate SUNAT was to use had been amended in February 2008, but the parties' damages experts had made their calculations before passage of the new law, using the lower rate provided by the prior law. Peru argued that the petitioner's claim for the higher rate should be dismissed because Peru already had paid the lower interest rate, which, according to Peru, was the correct interest rate; in the alternative, Peru argued that the award was ambiguous and should be remanded to the ICSID tribunal. The court rejected Peru's argument, awarding the petitioner the higher rate. The court reasoned that while 'Peru suggests that [the] change in the law was an unanticipated contingency, the plain language of the award allows for the interest rate to fluctuate

37 *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013). Several district court decisions have also questioned the persuasiveness of the *D.R. Hutton* decision. See, e.g., *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012); *Tenet HealthSystem Phila., Inc. v. Rooney*, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012); *LaVoice v. UBS Fin. Servs., Inc.,* 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012). But see *Herrington v. Waterstone Mortg. Corp.*, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012); *Raniere v. Citigroup, Inc.,* 827 F. Supp. 2d 294 (S.D.N.Y. 2011).

38 *Telenor Mobile Commc'ns AS v. Storm LLC*, 351 F. App'x 467, 469 (2d Cir. 2009).

39 *Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru*, 892 F. Supp. 2d 53 (D.D.C. 2012) (denying Peru's motion to dismiss, or alternatively remand); *Duke Energy Int'l Peru Inv. No. 1 Ltd. v. Republic of Peru*, 2012 WL 5839206 (D.D.C. Sept. 14, 2012) (granting Duke Energy's motion to confirm).

40 *Duke Energy Int'l Peru Invs*. No. 1 Ltd., 892 F. Supp. 2d at 56.

freely'.[41] It concluded that the 'respondent has demonstrated no ambiguity sufficient to warrant the exceptional remedy of remand'.[42]

Another defence to the enforcement of an award, lack of personal jurisdiction, was the subject of several recent federal court decisions. In *First Investment Corp v. Fujian Mawei Shipbuilding, Ltd*, the petitioner did not dispute that the respondents had no contacts with the United States and that therefore a court could not assert personal jurisdiction over the respondents for the purpose of enforcing an award under a traditional constitutional due process analysis. However, the petitioner argued first that foreign entities with no contacts with the United States were not entitled to due process protection, second that the New York Convention does not require personal jurisdiction for the confirmation of an arbitral award, and finally that the respondents were alter egos of the Republic of China, a foreign state over which personal jurisdiction was not required.

The court found that the petitioner's first argument was foreclosed by Supreme Court precedent.[43] With regard to the second argument, the court acknowledged that the New York Convention does not list personal jurisdiction as a requirement for the enforcement of an arbitral award. The court noted, however, that due process is a constitutional requirement and therefore takes precedent over any statute: 'Congress could no more dispense with personal jurisdiction in an action to confirm a foreign arbitral award than it could under any other statute.'[44]

The petitioner's alter ego argument was based on the fact that the due process clause protects 'persons' and therefore arguably does not extend to foreign states. The Fifth Circuit Court of Appeals assumed, without deciding, that this was the case. It then engaged in the traditional alter ego analysis established by the Supreme Court in *First National City Bank v. Banco Pare El Comercio Exterior de Cuba*.[45] The factors included under this analysis are 'ownership and management structure of the [alleged alter ego], paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government'.[46] Equitable principles are also considered, 'particularly the principle of disregarding the corporate form in instances where respecting it would lead to injustice'.[47] The Court found that the requirements for finding an alter ego were not met in this case.

In *Sonera Holding v. Cukurova Holding AS*, the defendants also argued that a New York district court should not enforce a foreign award due to a lack of personal jurisdiction. The court held that 'pursuant to the New York Convention, a court is

41 Id., at 57.

42 Id., at 58.

43 *First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd*, 703 F.3d 742, 747 (5th Cir. 2012).

44 Id., at 750.

45 462 US 611 (1983).

46 *First Inv. Corp,* 703 F.3d at 753 (quoting *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1382 (5th Cir. 1992)).

47 Id.

required to have personal or *quasi in rem* jurisdiction over the parties'.[48] The court then noted that under New York's long-arm statute, personal jurisdiction exists over a foreign corporation that is doing business in the state not occasionally or casually, but with a fair measure of permanence and continuity.[49] This standard is more restrictive than, and therefore satisfies, constitutional due process.

Under New York law, an affiliate's activities can give rise to personal jurisdiction over a foreign corporation if the affiliate 'renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available'.[50] The court found that the activities of the respondent's affiliates in this case, including the distribution of textiles for the respondent, clearly met this standard.

In *Sonera Holding*, the defendants also argued that the court should not enforce the award on the basis of *forum non conveniens*. Under the Second Circuit's controversial 2011 decision in *Figueiredo v. Republic of Peru*,[51] the *forum non conveniens* doctrine applies to the enforcement of arbitral awards in the Second Circuit. Nevertheless, the *Sonera* court quoted approvingly from Judge Lynch's dissent in *Figueiredo*, noting that 'international arbitration is viable only if the awards issued by arbitrators can be easily reduced to judgment in one country or another and thereby enforced against the assets of the losing party' and that the New York Convention 'carefully circumscribe[s] the bases on which the courts of a signatory nation could disregard an arbitration provision or refuse to enforce an arbitral award'.[52] In light of this background, the *Sonera* court reasoned that *forum non conveniens* arguments 'that may have some weight or even considerable weight in the context of a lawsuit in which the merits of a claim will be decided may have limited appeal when the context is the enforcement of an arbitration award governed by the New York Convention'.[53] The court then rejected Sonera Holding's *forum non conveniens* arguments. In particular, while acknowledging that Turkey had a strong interest in a dispute concerning a major Turkish telecommunications provider, the court noted that the respondent 'having executed an agreement that provided for foreign arbitration and foreign enforcement of any arbitral award, it is difficult to find that Turkey's interest in its telecommunications industry should trump any of the other public policy interests that support foreign enforcement of foreign arbitral awards'.[54]

Finally, in *Blue Ridge Investments LLC v. Republic of Argentina*, Argentina advanced a variety of defences to prevent the enforcement of an ICSID award against it. Argentina argued that that the court lacked jurisdiction under the Foreign Sovereign Immunities Act ('FSIA'), that the petitioner was not a 'party' that could enforce an award under the

48 *Sonera Holding B.V. v. Cukurova Holding A.S.*, 2012 WL 3925853, at *2 (S.D.N.Y. Sept. 10, 2012).

49 Id., at *3 (internal quotation marks and citation omitted).

50 Id., (internal quotation marks and citation omitted).

51 *Figueiredo Ferraz E Engenharia de Projects Ltda. v. Republic of Peru*, 665 F.3d 384 (2d 2011).

52 *Sonera Holding B.V.*, 2012 WL 3925853, at *8.

53 Id.

54 Id., at *10.

ICSID Convention and that the claim was time-barred. The New York federal district court rejected each argument in turn.

The FSIA provides that a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the states' except in limited circumstances.[55] The petitioner argued that two such exceptions applied in this case. First, Argentina impliedly had waived immunity, and second, the FSIA specifically provides that a foreign state shall not be immune from jurisdiction with respect to the enforcement of an arbitral award if the '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.'[56] The court agreed that both exceptions applied. It found that since Argentina chose to become a contracting party to the ICSID Convention – 'which provides for the automatic recognition and enforcement of awards in contracting states' – it had clearly anticipated 'the availability of a cause of action in the United States' and therefore impliedly had waived immunity under the FSIA with regard to recognition and enforcement of an award.[57] Moreover, the second exception was met because the ICSID Convention is a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.[58]

Argentina also argued that Blue Ridge lacked authority to enforce the award under the ICSID Convention because it had not been a party to the underlying arbitration, but rather had purchased the award from the original claimant. Article 54 of the ICSID Convention refers to a party seeking recognition and enforcement of an award, and Argentina claimed that 'party' in this context referred to a party to the underlying arbitration. After a lengthy analysis of the Convention, the court rejected Argentina's argument: 'Nothing in Article 54(2) suggests that it was intended to communicate that only a "party to the arbitration" can seek enforcement of an ICSID Convention award, nor does any other provision in the Convention suggest such a restriction. Any such intent could easily have been expressed.'[59]

Finally, the court addressed Argentina's argument that Blue Ridge was time-barred from confirming the award under New York's one-year statute of limitations for the confirmation of an arbitral award. The court noted that neither the ICSID Convention nor the legislation implementing the Convention contains a statute of limitation, and it held that in such circumstances a court must borrow the local jurisdiction's time limitation most analogous to the case at hand. In this case, the court found that 'Congress has determined that in enforcing an ICSID award, a federal court is to treat it as it would a final judgment from a state court.'[60] Thus, the court applied New York's 20-year statute

55 28 USC. Section 1604.

56 28 USC. Section 1605(a)(6).

57 *Blue Ridge Invs., LLC v. Republic of Argentina*, 2012 WL 4714819, at *4 (S.D.N.Y. Sept. 30, 2012).

58 Id., at *5 (quoting 28 USC. Section 1605(a)(6)).

59 Id., at *10.

60 Id., at 17 (citation omitted).

of limitation applicable to a final money judgment from the court of a sister state, rather than the one-year statute of limitation urged by Argentina.

Arbitrability

Under a long line of cases, including *Granite Rock Co v. International Brotherhood of Teamsters*,[61] 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.[62] These cases separate the question of the validity of the arbitration clause from all other issues related to the agreement, including validity of the overall agreement. Once an arbitration clause is deemed to have been properly entered into, other claims related to the contract containing the clause are referred to arbitration.

This rule was revisited this past year by the Eighth Circuit Court of Appeals in the context of a contract's dispute resolution article containing several sub-articles, one of which was an arbitration clause. In *MA Mortenson Co v. Saunders Concrete Co*,[63] a general contractor for a wind turbine project in New York state filed a demand for AAA arbitration in Minnesota (as provided by the arbitration clause) against a subcontractor, alleging deficient performance. When the subcontractor did not respond to the demand and instead sued the contractor in a New York state court, the contractor brought a motion to compel arbitration in Minnesota federal district court. The subcontractor opposed the motion, arguing that the disputes resolution article of the contract was unenforceable because one of its provisions, governing the subcontractor's claims against an owner and prohibiting recovery from the contractor for such claims, was contrary to New York state law. The subcontractor argued that because one of the provisions of the dispute resolution article was unenforceable, the entire article was unenforceable. The district court rejected this argument, and the Eighth Circuit affirmed. The court found that it did not need to consider the validity under New York law of the provision the subcontractor had questioned because the arbitration provision the contractor sought to enforce had not been challenged: 'only challenges to the validity of that provision could render the arbitration agreement unenforceable'.[64] The court distinguished cases where multiple Paragraphs were treated as a single agreement to arbitrate: 'Unlike cases involving one multi Paragraph provision outlining a unified arbitration process, […] the

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61 130 S. Ct. 2847 (2010). For an overview of competence-competence, including arbitrability, under US law see Born, International Commercial Arbitration 911–60 (2009).

62 *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).

63 676 F.3d 1153 (8th Cir. 2012).

64 Id., at 1158.

separate Paragraphs in the disputes article in the subcontract here detail distinct and in part mutually exclusive processes for resolving different types of dispute.'[65]

Whether a valid arbitration agreement exists is only one aspect (formation) of arbitrability. The other aspect (scope) concerns whether a valid arbitration agreement applies to a particular type of controversy. As discussed above, arbitrability is typically a question reserved for the courts (i.e., it is for a court to determine whether there is a valid arbitration agreement and whether a particular dispute falls within the scope of such an agreement). However, as the Second Circuit noted this past year in *Schneider v. Kingdom of Thailand*, the question of arbitrability will be for the arbitrator(s) to decide if 'there was clear and unmistakable evidence of the parties' intent to commit that question to arbitration'.[66] In *Schneider*, Thailand sought to resist the enforcement of an investment treaty arbitral award by arguing that the investment in question, a tollway project, was not an 'approved investment' under the relevant bilateral investment treaty and thus the dispute did not fall within the scope of the arbitration agreement. The district court had accepted, without independent inquiry, the tribunal's finding that there was an 'approved investment,' reasoning that no independent inquiry was necessary because the issue did not concern a question of agreement formation.[67] The Second Circuit rejected this reasoning, noting that questions of arbitrability are presumptively resolved by the court, regardless of whether they are related to scope or formation.[68] This finding, however, ultimately did not help Thailand's case because where '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'.[69] In this case, the parties had agreed to use the UNCITRAL Arbitration Rules, which allow the arbitral panel to rule on objections to its jurisdiction, including objections with respect to the existence or validity of the arbitration clause. This was clear evidence that the parties intended questions of arbitrability to be decided by the arbitral panel, and Thailand was therefore not entitled to an independent review of whether the tollway project was an 'approved investment'.

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

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65 Id., at 1157–58.

66 *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72 (2d Cir. 2012).

67 Id., at 71.

68 Id., at 72.

69 Id., See also *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012) (incorporation of AAA arbitration rules was clear evidence that the parties intended questions of arbitrability to be determined by the arbitrators); *Frontera E. Ga. Ltd. v. Arar, Inc.*, 483 F. App'x 896 (5th Cir. 2012) (same); *Gwathmey Siegel Kaufman & Assocs. Architects, LLC v. Rales*, 2012 WL 2247938 (S.D.N.Y. June 15, 2012) (same); *Sonera Holding B.V. v. Cukurova holding A.S.*, 2012 WL 3925853 (S.D.N.Y. Sept. 10, 2012) (same with regard to the ICC rules).

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 in fact 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: 'The 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'.[70] 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.[71] In 2008 the Supreme Court – again in *dicta* – questioned the validity of the manifest disregard ground in *Hall Street*:

> *Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the [FAA] Section 10 grounds collectively, rather than adding to them […]. Or, as some courts have thought, 'manifest disregard' may have been shorthand for Section 10(a)(3) or Section 10(a)(4), the Paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers […].' We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment […] and now that its meaning is implicated, we see no reason to accord it the significance that [petitioner] urges.*[72]

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'.[73] It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived *Hall Street*.[74]

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.[75] The

70 *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).

71 See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 91-93 (2d Cir. 2008), rev'd, 130 S. Ct. 1758, 1768 (2010).

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

73 Id., at 588 (citation omitted).

74 *Stolt-Nielsen S.A.*, 130 S. Ct. at 1768, n.3.

75 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

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.[76] This past year, both circuits issued decisions reaffirming the validity of the doctrine but determining that the high standard it required had not been met in the cases examined.[77] The Second Circuit noted that the 'standard is, by design, exceedingly difficult to satisfy'.[78] For it to apply, an arbitrator must have been aware of but ignored governing law that was well defined, explicit and clearly applicable; moreover, where an arbitration panel does not explain the reason for its decision, it will be upheld if any valid ground for it can be discerned.[79]

Recently, the Fourth Circuit ruled that the manifest disregard doctrine is still viable,[80] 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)'.[81] Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence since *Hall Street*.[82]

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ground for *vacatur*, it is no longer a basis for vacating awards under the FAA.') (internal 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'), cert. denied, 130 S. Ct. 3287 (2010). 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. Jan. 21, 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'.).

76 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).

77 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.*, 491 F. App'x 201 (2d Cir. 2012).

78 *Goldman Sachs Execution & Clearing, L.P.*, 491 F. App'x at 204.

79 Id., (citation omitted).

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

81 *Johnson Controls, Inc. v. Edeman Controls Inc.*, 2013 WL 1098411, at *4 (7th Cir. Mar. 18, 2013) (quotation marks and citations omitted).

82 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

While much of the post-*Hall Street* case law has focused on manifest disregard, other judicially created bases for *vacatur* have also been questioned. The Eleventh Circuit has invalidated other non-statutory grounds that previously had been recognised in that circuit (which includes Florida), including where the award was 'arbitrary and capricious' or in violation of public policy.[83]

The general trend of the cases has been to continue limitations on judicial review of awards, although the jurisprudential basis for doing so remains for ultimate clarification by the Supreme Court in the future.

Selection of arbitrators

The FAA authorises courts to intervene in the selection of arbitrators only in limited circumstances: when the arbitration agreement does not provide a method for selecting arbitrators, a party fails to abide by the method provided, or if there is a lapse in the naming of an arbitrator(s).[84] 9 USC Section 5 further instructs that the court shall appoint only one arbitrator unless otherwise provided in the agreement.

This past year the Fifth Circuit, following Second Circuit and Ninth Circuit precedent, defined a 'lapse' under 9 USC Section 5 to mean 'a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator selection process'.[85] In *BP Exploration Libya Ltd v. Exxon Libya Ltd*, the three parties to an arbitration reached an impasse when they deadlocked in the selection of arbitrators; all three asserted a right to appoint an arbitrator, but the arbitration agreement only provided for two party-appointed

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).

83 *Frazier v. CitiFinancial Corp*., LLC, 604 F.3d 1313 (11th Cir. 2010).

84 9 USC. Section 5 states: 'If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.'

85 *BP Exploration Libya Ltd. v. Exxon Libya Ltd.*, 689 F.3d 481, 492 (5th Cir. 2012).

arbitrators, who would then choose the third arbitrator. In these circumstances, upon the petitioning of one of the parties, the district court exercised its authority under 9 USC Section 5 to institute a novel solution: each party would appoint an arbitrator, and the three arbitrators would then appoint two additional arbitrators. The Fifth Circuit reversed, noting that 9 USC Section 5 expressly directs a court to respect parties' agreed-upon number of arbitrators. The circuit court found that the district court erred in deviating from the parties' express agreement to arbitrate before a three-member panel.[86] The Fifth Circuit directed the district court to enter an order for the appointment of three arbitrators and recommended that the district court require the co-respondents in the arbitration to jointly appoint the second arbitrator; if the co-respondents failed to agree on an arbitrator, the district court would make the appointment.[87]

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 of the FAA, an arbitral award should be vacated if the arbitrator(s) displayed 'evident partiality'. But this standard has been interpreted differently by different courts. As shown by a recent case, a party's success in vacating an award due to a lack of arbitrator disclosure may depend on the circuit in which the party brings the action. In *Ometto v. ASA Bioenergy Holding*, the petitioners sought to vacate an arbitral award on the basis of the presiding arbitrator not having disclosed that after the start of the arbitration his firm had advised clients on transactions involving one of the parties to the arbitration or its affiliate. The petitioners urged the court that even if the arbitrator had not been aware of the potential conflict, he 'should be charged with constructive knowledge of his law firm's engagements'.[88] The petitioners supported this position by reference to the Ninth Circuit case *Schmitz v. Zilveti*.[89] In rejecting the petitioners' position, the New York district court first articulated the Second Circuit's 'evident partiality' standard: 'this Court may only find 'evident partiality' sufficient to vacate an award when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side'.[90] The court then noted that

86 Id., at 483, 495.

87 Id., at 497.

88 *Ometto v. ASA Bioenergy Holding A.G.*, 2013 WL 174259, at *2 (S.D.N.Y. Jan. 9, 2013).

89 20 F.3d 1043 (9th Cir. 1994).

90 *Ometto*, 2013 WL 174259, at *3 (internal quotation marks and citation omitted) (emphasis in original). The Second Circuit requires that 'a reasonable person would have to conclude' partiality in cases where the potential conflict was disclosed by the arbitrator. See, e.g., *NGC Network Asia, LLC v. Pac Pac. Grp. Int'l, Inx.*, 2013 WL 490935 (2d Cir. Feb. 11, 2013).

the standard was different in the Ninth Circuit, as it required only an impression of possible bias, and concluded that Ninth Circuit precedent was 'both non-binding on this Court and countermanded by the more circumspect view of "evident partiality" adopted by this Circuit'.[91]

In *Freeman v. Pittsburgh Glass Works*, in response to the parties' confusion, the Third Circuit recently reaffirmed that its standard for 'evident partiality' was like that of the Second Circuit: 'An arbitrator is evidently partial only if a reasonable person would have to conclude that she was partial to one side.'[92] The Third Circuit added that this standard applied equally 'to so-called actual-bias cases (where the relevant facts were known and objected to beforehand)' and 'non-disclosure cases (where the relevant facts were not disclosed)'.[93] In *Freeman v. Pittsburgh Glass Works*, the petitioner, Freeman, sought to vacate an arbitral award due to the arbitrator's failure to disclose (1) campaign contributions she had received from Pittsburgh Glass when she made an unsuccessful bid for a seat on the Pennsylvania Supreme Court, and (2) her teaching relationship with a senior employment attorney of Pittsburgh Glass. Having articulated the circuit's standard, the court went on to find that the standard was not met in this case. The contributions were a matter of public record, were far less than 1 per cent of the total money the arbitrator had raised, and the firm representing Freeman had donated five times as much. The court also found the teaching relationship not to be suggestive of bias.

The law in this area remains at least doctrinally non-uniform, however. A recent case confirms that the standard for 'evident partiality' for a non-disclosure case in the Fifth Circuit is, as in the Ninth Circuit, a 'reasonable impression of bias'.[94] In that case, *Dealer Computer Services v. Michael Motor Co*, however, the court did not have an opportunity to apply the standard because it found that the petitioner had waived its objection by failing to raise it during the arbitration. The presiding arbitrator had disclosed that she had served on an arbitral panel hearing a prior arbitration involving Dealer Computer Services. She failed to disclose, however, that the prior arbitration involved similar contract language and testimony from the same damages expert. Michael Motor Company conceded that a party waives an objection to an arbitrator by failing to assert it during the course of the arbitration, but argued that in this case it could not have objected at that time because of the arbitrator's failure to provide full disclosure. The court was unsympathetic, finding that the arbitrator had disclosed enough information 'to put MMC on notice of a potential conflict', especially 'in light of MMC's duty to reasonably investigate'.[95]

The issue of waiver was also recently addressed in *Merrill Lynch, Pierce, Fenner & Smith, Inc v. Smolchek*.[96] In this case the arbitrator failed to disclose that a few years earlier

91 *Ometto*, 2013 WL 174259, at *4.

92 *Freeman v. Pittsburgh Glass Works LLC,* 709 F.3d 240, 253 (3d Cir. 2013).

93 Id., at 254.

94 *Dealer Computer Servs. v. Michael Motor Co.,* 485 F. App'x 724, 726 (5th Cir. 2012).

95 Id., at 728.

96 2012 WL 4056092 (S.D. Fla. Sept. 17, 2012).

her husband had won a sizeable award against Merrill Lynch and had publicly discussed the victory. However, because Merrill Lynch had known of the arbitrator's husband's involvement in the award, even if not of his public comments, it waived any objection based on these facts when it failed to state its concerns until after the arbitrator made several rulings against it.[97]

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

> *(1) the request must 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.*[99]

Several cases this past year in the Eleventh Circuit have held, in contrast to decisions in other circuits, that a foreign arbitral panel constitutes 'a foreign or international tribunal' for purposes of the statute and that US federal courts may therefore order discovery in aid of a foreign arbitration.

Older cases had suggested the opposite, that a foreign arbitration did not fall within the statute's purview, which was thought only to include foreign judicial proceedings.[100] 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.[101] 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

97 Id., at *3.

98 '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).

99 *In re Consorcio Ecuatoriano de Telecomunicacions S.A.*, 685 F.3d 987, 993 (11th Cir. 2012).

100 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).

101 *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).

extends also to "administrative and quasi-judicial proceedings"'.[102] The Court also relied on a definition of tribunal that included arbitral tribunals.[103]

While some courts have held that *Intel* is not applicable to a private commercial arbitration, this past year the Eleventh Circuit, in *In re Consorcio Ecuatoriano de Telecomunicacions SA*, deciding 'an issue of first impression [in the] Circuit', relied on *Intel* to find that an arbitral panel in a commercial arbitration in Ecuador was a 'tribunal' for purposes of Section 1782.[104] In so doing, the Eleventh Circuit applied a functional approach to the meaning of the term and in particular considered 'whether the arbitral tribunal acts as a first-instance adjudicative decisionmaker, whether it permits the gathering and submission of evidence, whether it has the authority to determine liability and impose penalties, and whether its decision is subject to judicial review'.[105]

The court then considered the four factors the *Intel* decision noted should guide a court's decision about whether to exercise its discretion to order discovery under Section 1782:

a whether 'the person from who discovery is sought is a participant in the foreign proceeding', because 'the need for Section 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from the non-participant' over which the foreign tribunal may not have jurisdiction;

b 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to US federal-court judicial assistance';

c 'whether the Section 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States'; and

d whether the request is otherwise 'unduly intrusive or burdensome'.[106]

After examining these discretionary criteria, the court affirmed the district court's order permitting the petitioner to seek documents from the US affiliate of the petitioner's counterparty in the Ecuadorean arbitration regarding the invoicing and calculation of rates at issue in that arbitration.

Three district courts in the Eleventh Circuit have ordered discovery under Section 1782 in aid of foreign arbitration this past year. Relying on the *Consorcio* decision, a court in the Southern District of Florida permitted Mesa Power, a claimant in a NAFTA arbitration against Canada, to obtain documents from a competitor for the purpose of bolstering Mesa Power's claim in the arbitration that it had been discriminated against by Canada in violation of the treaty.[107] Immediately prior to the *Consorcio* decision,

102 Id., at 248-49.

103 Id., at 258.

104 *In re Consorcio Ecuatoriano de Telecomunicacions S.A.*, 685 F.3d at 994.

105 Id., at 995.

106 Id., at 998 (quoting *Intel*, 524 US at 264–65).

107 *In re Mesa Power Grp., LLC*, 878 F. Supp. 2d 1296 (S.D. Fla. 2012). Mesa Power similarly applied for and obtained discovery under Section 1782 in the district court of New Jersey. *In re*

relying on the district court decisions of other circuits, another court in the Southern District of Florida permitted Chevron to obtain discovery from a Miami branch of an Ecuadorean bank for the purpose of supporting Chevron's claim in its treaty arbitration against Ecuador that it had been the victim of fraud in Ecuadorean court proceedings.[108] Ecuador, however, subsequently turned the tables on Chevron in the Northern District of Florida where it obtained discovery under Section 1782 to obtain documents from Chevron's testifying expert in earlier litigation.[109]

Ecuador also prevailed in the Fifth Circuit in a case where Chevron argued that a foreign arbitral panel was not an 'international tribunal' for purposes of Section 1782. Chevron based its argument – which was inconsistent with the arguments it had made in numerous district courts elsewhere in the country – on Fifth Circuit precedent that Chevron had specifically distinguished in other courts. The Fifth Circuit rejected Chevron's argument on the basis of judicial estoppel, reasoning that Chevron should not gain an unfair advantage over its adversary by taking inconsistent legal positions.[110] Since it based its decision on judicial estoppel, the Fifth Circuit did not reach the question of whether a foreign arbitral panel is an 'international tribunal' for purposes of Section 1782.

Sanctions for frivolous challenges to arbitration awards

Although 'sanctions must not be imposed lightly' by US courts,[111] recent decisions in the Second Circuit have imposed sanctions of attorney fees pursuant to 28 USC Section 1927 on attorneys who frivolously opposed the confirmation or enforcement of an arbitral award.[112] In *Enmon v. Propsect Capital Co*, the Second Circuit affirmed sanctions of attorney fees totalling $354,559 in a case where a law firm 'acted in bad faith and engaged in frivolous and vexatious litigation' when it twice sought to stay arbitration and then opposed confirmation of the award.[113] Similarly, in *DigiTelCom, Ltd v. Tele2 Sverige AB*, the district court imposed Section 1927 sanctions when the attorney for a party opposing enforcement misrepresented facts, cited 'virtually no relevant authority,' and accused the tribunal of bias 'without providing any basis whatsoever for such an accusation'.[114] The court observed that 'although courts should be careful not to chill parties' good-faith challenges to arbitration awards where there are serious questions of the tribunal's impartiality or authority, litigants must be discouraged from defeating the purpose of arbitration by bringing such petitions based on nothing more than

Mesa Power Grp., LLC, 2012 WL 6060941 (D.N.J. Nov. 20, 2012).

108 *In re Chevron Corp.*, 2012 WL 3636925 (S.D. Fla. June 12, 2012).

109 *In re Republic of Ecuador*, 2012 WL 5519611 (N.D. Fla. Nov. 2, 2012).

110 *Republic of Ecuador v. Connor*, 708 F.3d 651, 658 (5th Cir. 2013).

111 *DigiTelCom, Ltd. v. Tele2 Sverige AB*, 2012 WL 3065345, at *7 (S.D.N.Y. July 25, 2012).

112 28 USC Section 1927 provides that '[a]ny attorney […] who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.'

113 *Enmon v. Propsect Capital Co.*, 675 F.3d 138, 143 (2d Cir. 2012).

114 *DigiTelCom, Ltd.*, 2012 WL 3065345, at *7.

dissatisfaction with the tribunal's conclusions. For this reason, sanctions are peculiarly appropriate in the context of a challenge to an arbitration award that appears to be a largely dilatory effort'.[115]

The Seventh Circuit has recently similarly observed that 'challenges to commercial arbitral awards bear a high risk of sanctions. Attempts to obtain judicial review of an arbitrator's decisions undermine the integrity of the arbitral process.'[116] In that case, the court did not award sanctions for a frivolous appeal under Federal Rule of Appellate Procedure 38 'largely because the fee-shifting clause in the contract already assures that [the prevailing party] will not bear the costs of this appeal'.[117]

Of course, it remains the case that it is always in the court's discretion whether to award sanctions. In a somewhat different context – that of a party seeking to litigate its claims in court despite a clear contractual obligation to arbitrate – a district court in the Second Circuit did not exercise its discretion to award sanctions under Federal Rule of Civil Procedure 11(b). While the party's 'claims and legal contentions [were] objectively unreasonable', which is the standard for triggering the award of fees under Rule 11, the court reasoned that because arbitrability is typically for a court to determine, the losing party's arbitrability challenge, although without merit, did not rise to the level of sanctionable conduct.[118] A similar conclusion was reached regarding Rule 11 in *Ipcon Collection LLC v. Costco Wholesale Corp*, where the Second Circuit affirmed a district court's decision not to impose sanctions, despite Ipcon's weak arguments for bringing a suit in court rather than initiating arbitration, 'given the confusing nature of the division of responsibility between courts and arbitrators as to contract formation'.[119]

Delaware confidential court arbitration procedure declared unconstitutional

In the US, sitting judges may not serve as arbitrators in private disputes. But in 2009, Delaware enacted a statute establishing a confidential arbitration procedure within the court system, which could apply to international as well as domestic cases, to be conducted by active judges of the Delaware Court of Chancery 'when the parties request a member of the Court of Chancery […] to arbitrate a dispute'.[120] Under the statute:

a both parties must consent to participate;
b at least one party must be a business entity;
c at least one party must be a citizen of Delaware;
d if the remedy sought only included monetary damages, the amount in controversy must be more than $1 million; and
e neither party may be a consumer, defined as an individual who purchases or leases merchandise for personal use.

115 Id., (internal quotation marks and citation omitted).

116 *Johnson Controls, Inc. v. Edman Controls, Inc.*, 2013 WL 1098411, at *7 (7th Cir. Mar. 18, 2013).

117 Id.

118 *Optimus Commc'ns v. MPG Assocs., Inc.*, 841 F. Supp. 2d 722, 726-28 (E.D.N.Y. 2012).

119 *Ipcon Collection, LLC v. Costco Wholesale Corp.*, 698 F.3d 58, 63-64 (2d Cir. 2012).

120 10 Del. Code Section 349.

The Chancery Court adopted rules that included the requirement that all parts of the proceeding, including all the filings and all contacts between the arbitrator and any party, be maintained as confidential.[121]

In *Delaware Coalition for Open Government v. Strine*, the plaintiff argued that the proceedings instituted under the Delaware statute could not permissibly be closed to the public. The key question for the court was whether Delaware had implemented a form of commercial arbitration, or whether the proceedings were 'sufficiently like a trial' so that it should be open to the public under established First Amendment jurisprudence. The court found that the Delaware procedure was essentially a civil trial. The court articulated several factors leading to this determination, but one of the key factors was that a sitting judge presided over the proceedings. The court noted that '[i]n the Delaware proceeding, the parties submit their dispute to a sitting judge acting pursuant to state authority, paid by the state, and using state personnel facilities; the judge finds facts, applies the relevant law, determines the obligations of the parties; and the judge then issues an enforceable order.'[122] Because the procedure was sufficiently like a trial, the right of public access applied and the court struck down the Chancery Court rules that made the procedure confidential. The case is now on appeal.

ii Arbitration developments in Congress

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.

iii Investment treaty cases involving US nationals

The US–Ecuador bilateral investment treaty ('BIT') has been the subject of intense litigation and interesting results during the past year. Two prominent arbitrations involving US nationals and Ecuador (*Occidental v. Ecuador II* and *Chevron v. Ecuador II*) are ongoing, and the tribunals in these cases have issued ground-breaking decisions. In addition, Ecuador suffered a setback in a case against a US national in *Burlington v. Ecuador,* in which the tribunal found it liable for expropriation and will now move to the damages phase. Finally, a 2009 award in *Chevron v. Ecuador I* prompted Ecuador to bring a state-to-state arbitration against the US regarding the interpretation of the effective means clause of the BIT. This arbitration was dismissed on jurisdictional grounds. Ecuador is said to be contemplating terminating the BIT.

121 *Delaware Coalition for Open Gov't v. Strine*, 2012 WL 3744718, at *1, *3 (E.D. Pa. Aug. 30, 2012).

122 Id., at *9.

The tribunal in *Occidental v. Ecuador II* awarded Occidental $1.7 billion in damages (more than $2 billion including interest) in a split decision in August 2012.[123] This award is believed to be the largest in ICSID history. The finding of liability was based on Ecuador's 2006 termination of Occidental's concession contract for the production of oil due to Occidental's allegedly unauthorised transfer of partial interest in the contract to another company. While the tribunal found that the transfer of interest did indeed breach the concession contract, the termination of the contract was deemed disproportionate and expropriatory.[124]

The dissenting arbitrator agreed with the finding of liability and the calculation of damages by Occidental's expert witnesses, which was based on a discounted cash-flow analysis and an assessment of the amount of unproduced crude oil, but she would have significantly reduced these damages based on several legal defences urged by Ecuador, including contributory fault.[125] Ecuador has initiated ICSID annulment proceedings.

The tribunal in *Chevron v. Ecuador II* issued four interim awards in the past year. The first, second and fourth interim awards concerned interim measures, while the third interim award found that the tribunal has jurisdiction over the dispute. The first and second interim awards stayed execution of a future judgment in the much-publicised *Lago Agrio* litigation, in which Ecuadorean plaintiffs have sued Chevron for environmental damages and which Chevron alleges has been tainted by corruption and illegal procedures. These awards, and similar prior orders, have generated controversy as some critics have argued that the stay of a future judgment in a third-party litigation exceeds an investment treaty tribunal's powers.

The court in the *Lago Agrio* litigation issued an $18 billion judgment against Chevron shortly after the second interim award. The plaintiffs then sought to enforce the judgment in several jurisdictions (Argentina, Brazil and Canada) and successfully froze Chevron assets in Argentina. The treaty tribunal responded with the fourth interim award, finding that Ecuador had violated the first two interim awards by permitting the judgment to become enforceable in Ecuador, leading to the plaintiff's attempts at enforcement outside Ecuador. The tribunal declared 'as a matter of international law, that the respondent has a continuing obligation to ensure that the commitments that it has given under the Treaty and the UNCITRAL Rules are not rendered nugatory by the finalisation, enforcement or execution of the *Lago Agrio* judgment'.[126] The tribunal added that Ecuador 'shall show cause […] why [Ecuador] should not compensate [Chevron] for any harmed caused by the […] violations of the First and Second Interim Awards'.[127] This case promises to have further interesting developments in the coming year and

123 *Occidental Petroleum Corp. & Occidental Exploration & Prod. Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Award (5 Oct. 2012).

124 Id., at Paragraphs 384–456.

125 *Occidental Petroleum Corp. & Occidental Exploration & Prod. Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Brigitte Stern (5 Oct. 2012).

126 *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador [II],* PCA Case No. 2009-23, Fourth Interim Award on Interim Measures (7 Feb. 2013), Paragraph 82.

127 Id. at Part IV: Operative Part, Paragraph 2.

has certainly set important precedent regarding an investment treaty tribunal's power to order interim measures.

In another setback for Ecuador, it was found liable for expropriation in the *Burlington v. Ecuador* case. The tribunal found that Ecuador expropriated Burlington's investment when it physically took control of Burlington's oil concessions in Ecuador.[128] The decision was not a total loss for Ecuador because, in a split decision, the tribunal found that Ecuador's Law 42, a windfall tax imposed on the oil industry, was not expropriatory.[129] Law 42, which imposes a 99 per cent tax on profits above a certain threshold, essentially caps an oil company's profits at the profits it would have made had the price of oil, adjusted for inflation, not risen since the company signed its concession contract. The tribunal's finding that Law 42 does not breach the BIT may assist Ecuador's position in its disputes with other foreign investors regarding Law 42.

Ecuador suffered a fourth setback this past year relating to the BIT when its state-to-state arbitration against the United States regarding the meaning of Article II(7) of the BIT was dismissed for lack of jurisdiction. In *Chevron v. Ecuador I*, the tribunal had found that Article II(7) – which requires a state to provide investors with effective means for asserting claims and protecting rights – provided a lower standard for finding a treaty breach than the traditional notion of denial of justice. The tribunal then found that delays in certain Ecuadorean court proceedings, while perhaps not rising to the level of a 'denial of justice,' did violate Article II(7).[130] After the award was rendered, Ecuador requested that the United States agree that this interpretation of Article II(7) was erroneous and that there was no difference in standards between Article II(7) and denial of justice. When the United States failed to respond to this request, Ecuador initiated a state-to-state arbitration, likely the first of its kind, seeking to define the meaning of Article II(7). The tribunal's jurisdictional decision dismissing the case is unpublished, but the United States had argued that the tribunal lacked jurisdiction for the following reasons:

a there was no dispute to be resolved because the United States had no obligation to respond to Ecuador's request under the BIT;

b since there was no dispute, Ecuador only raised an abstract question, and the tribunal had no advisory jurisdiction to issue an interpretative decision that would be binding on other tribunals;

c the tribunal had no appellate jurisdiction to sit in judgment of a prior tribunal's decision; and

128 *Burlington Res. Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 Dec. 2012), Paragraphs 541–545.

129 Id., at Paragraph 457.

130 *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador [I],* PCA Case No. AA 277, Partial Award on the Merits (30 Mar. 2010), Paragraphs 321–32. The reasoning of the *Chevron v. Ecuador I* tribunal has been followed subsequently in *White Industries v. India*, where court delays similarly were found to violate an 'effective means' provision of a bilateral investment treaty. *White Indus. Austl. Ltd. v. Republic of India*, UNCITRAL, Final Award (30 Nov. 2011), Paragraphs 11.3.1–3.2 and 11.4.16–4.20.

d the tribunal had no referral jurisdiction to resolve legal questions posed by states for use in investor–state arbitration.

The dismissal of this unusual arbitration may dissuade states from trying in the future to seek definitive interpretations of bilateral investment treaties through state-to-state arbitration.

iv 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. Beginning in July 2013, NYIAC will open a centre for the conduct of international arbitration at 150 East 42 Street, one block from Grand Central Station. The centre will be used for hearings and conferences. NYIAC will 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 class arbitration the most widely discussed issue. But rulings by the Supreme Court are likely to bring greater order to the case law in this area shortly. 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

ABOUT THE AUTHORS

JAMES H CARTER

Wilmer Cutler Pickering Hale and Dorr LLP

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

CHRISTOPHER HOWITT

Wilmer Cutler Pickering Hale and Dorr LLP

Christopher Howitt is an associate in the litigation and controversy department, and a member of the international arbitration practice group.

Mr Howitt is an English barrister. Before joining the firm, Mr Howitt completed a pupillage at a leading chambers in London. His experience includes commercial litigation, civil fraud, insolvency, banking and financial services matters.

CLAUDIO SALAS

Wilmer Cutler Pickering Hale and Dorr LLP

Claudio Salas is counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP and a member of the international arbitration practice group. He regularly

represents and advises clients in both investment and commercial arbitrations under the leading international arbitration rules (ICC, ICDR, UNCITRAL, ICSID). A native Spanish speaker, Mr Salas has particular expertise in Latin America-related disputes and has been involved in several high stakes investment treaty arbitrations in the region. Mr Salas has handled disputes in diverse industries, including oil and gas, insurance, chemical, medical devices, and financial services. In addition, he has litigated both against and on behalf of foreign sovereigns in US federal district courts and appellate courts, and he has represented clients in connection with US government investigations and administrative proceedings. He is a graduate of Middlebury College and Yale Law School.

DUNCAN SPELLER

Wilmer Cutler Pickering Hale and Dorr LLP

Duncan Speller is a partner in the firm's litigation and controversy department, and a member of the international arbitration practice group. He joined the firm in 2002. Mr Speller is based in the London office, where he practises international arbitration and English High Court litigation.

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.

WILMER CUTLER PICKERING HALE AND DORR LLP

49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537
duncan.speller@wilmerhale.com
christopher.howitt@wilmerhale.com

7 World Trade Center
250 Greenwich Street
New York, New York 10007
United States
Tel: +1 212 230 8800
Fax: +1 212 230 8888
james.carter@wilmerhale.com
claudio.salas@wilmerhale.com

www.wilmerhale.com