THE INTERNATIONAL ARBITRATION REVIEW

Eighth Edition

Editor
James H Carter

THE LAWREVIEWS

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EIGHTH EDITION

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The International Arbitration Review
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This article was first published in The International Arbitration Review, - Edition 8
(published in August 2017 – editor James H Carter)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-68-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALLEN & OVERY LLP

ANJARWALLA & KHANNA

ANWALTSBÜRO WIEBECKE

ATELIER JURÍDICO

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UNITED STATES

James H Carter, Sabrina Lee and Stratos Pahis[1]

I INTRODUCTION

For the first time in recent years, the US Supreme Court has not decided a commercial or investment arbitration issue this term. The Court nevertheless has agreed to hear a case involving arbitration clauses that include a waiver of any right to pursue 'class' or collective claims in any forum. The Court hearing that issue will include a new member, Justice Neil Gorsuch, whose views on international arbitration questions are largely unknown. Cases involving such waivers arise most often in the context of consumer, employee or franchisee cases that have few international aspects. However, since US arbitration law is largely uniform in its application to both domestic and international cases, the effect of the resolution of these issues is likely to be significant for both.

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

i The structure of US courts

The United States court system includes a federal system and 50 state systems (plus territorial courts) with overlapping jurisdictions. The federal system is divided into district courts, intermediate courts of appeal referred to as 'circuits' and the Supreme Court, which is the court of last resort. Each state has its own court system governed by its state constitution and its own set of procedural rules. While state systems vary, most mirror the federal system's three-tiered hierarchy of trial courts, appellate courts and a court of last resort. There are no specialist tribunals in the federal or state systems that deal solely with arbitration law, although New York and Florida have made provision for special handling of international arbitration matters in certain of their state courts. Because of the structure of US law, most cases involving international arbitration are dealt with in the federal courts.

ii The structure of arbitration law in the US

The Federal Arbitration Act (FAA) governs almost all types of arbitrations in the US, regardless of the subject matter of the dispute. It is by no means comprehensive, however, instead regulating arbitrations only at the beginning and end of their life cycles. Under the

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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 an award may be issued are limited and exclusive and, in general, are designed to prevent fraud, excess of jurisdiction or procedural unfairness, rather than to second-guess the merits of the panel's decision.[4]

The FAA's largely hands-off approach reflects US federal policy strongly favouring arbitration as an alternative to sometimes congested, ponderous and inefficient courts.[5] It was this pro-arbitration policy that led the Supreme Court to interpret an arbitration clause expansively to include statutory antitrust claims in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, allowing arbitrators to enforce federal antitrust law alongside judges.[6] In the international context, this pro-arbitration policy is further evidenced by the implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention) in Chapters 2 and 3, respectively, of the FAA.[7]

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

iii Distinctions between international and domestic arbitration law in the US

The FAA enacts the New York and Panama Conventions. Thus, as a general matter, there are no significant distinctions at the federal level between international and domestic arbitration law.[9] The FAA gives federal courts an independent basis of jurisdiction over any action or proceeding that falls under the New York Convention, opening the federal courts

2 9 USC Section 2.

3 9 USC Section 3.

4 An arbitral award may be vacated under the FAA where, for example, the parties or arbitrators behaved fraudulently or where the arbitrators 'exceeded their powers' as defined in the arbitration agreement. For a complete list of grounds of *vacatur*, see the FAA at Section 10.

5 See *Moses H Cone Mem'l Hosp v. Mercury Constr Corp*, 460 US 1, 24 (1983) ('Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary').

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

7 See FAA, 9 USC Sections 201–208, 301–307.

8 See *Allied-Bruce Terminix Cos v. Dobson*, 513 US 265, 281 (1995) (holding that the FAA pre-empts state policy that would put arbitration agreements on an 'unequal footing').

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 the passages on 'manifest disregard', below.

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

Class arbitration

Employment agreements containing arbitration clauses with 'class action waivers' remain a topic of dissension among the circuit courts. The debate centres on whether employers that require their employees to agree to arbitration clauses waiving their right to bring collective action claims are violating Section 8(a)(1) of the National Labor Relations Act (NLRA). Section 8(a)(1) prohibits employers from interfering with employees' exercise of their Section 7 rights: namely, to engage in concerted activities.

The issue first arose in 2012, when the National Labor Relations Board (NLRB) held in *DR Horton* that an employer violates the NLRA by requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all fora.[11] The Board reasoned that such agreements restrict employees' Section 7 right to engage in concerted activity, and concluded that employees could reasonably construe the arbitration agreement to preclude employees from filing unfair labour practice charges with the NLRB, which also violates Section 8(a)(1).[12]

During the four years following this decision, three circuit courts rejected the NLRB's decision in *DR Horton* and held instead that the NLRA does not prohibit class waivers. The Fifth Circuit was the first to address the issue, holding that the use of class action procedures was not a 'substantive right' under Section 7 of the NLRA, and thus a collective action waiver did not violate Section 8(a)(1) of the NLRA.[13] The court also held that the FAA requires that an arbitration agreement must be enforced according to its terms.[14]

10 The Supreme Court has ruled that the FAA does not provide an independent basis for subject matter jurisdiction over a motion to compel arbitration in potentially arbitrable disputes not governed by the New York Convention. See *Vaden v. Discover Bank*, 556 US 49 (2009).

11 *DR Horton, Inc*, 357 NLRB 184 (2012).

12 Ibid. at *2, *18.

13 *DR Horton v. National Labor Relations Board*, 737 F3d 344, 362 (5th Cir 2013).

14 Ibid. The Fifth Circuit subsequently reaffirmed its position in *Murphy Oil v. National Labor Relations Board*, 808 F3d 1013 (5th Cir 2015). In that case, the Court considered an arbitration agreement that required 'any and all disputes or claims' to be resolved through arbitration and required employees to waive their right to class or collective action. The Court found that this arbitration agreement violated Section 8(a)(1) of the NLRA, reasoning that the broad 'any claims' language can create the reasonable impression that the employee was waiving her right to file unfair labour practice charges with the NLRB, which is prohibited under Section 8(a)(1). See *Murphy Oil*, 808 F3d at 1019.

The Second and Eighth Circuits soon followed suit, reasoning that the FAA mandates enforcement of arbitration agreements unless that statute's mandate has been overridden by a contrary congressional command and there is no 'contrary congressional command' in the labour laws.[15]

This consensus was broken in May 2016 when the Seventh Circuit became the first circuit court to adopt the NLRB's decision in *DR Horton* and strike down class waivers in *Lewis v. Epic Systems*.[16] The Seventh Circuit held that the arbitration agreement violated Section 8(a)(1) of the NLRA because class actions are 'concerted activity' under Section 7.[17]

The court also found there was no conflict between the NLRA and the FAA. It noted that the FAA's savings clause provides that agreements to arbitrate 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract'.[18] The court reasoned that because the arbitration agreement was unlawful under Section 8 of the NLRA, it falls within the FAA's savings clause; thus, there is no conflict between the two statutes.[19]

A few months later, in August 2016, the Ninth Circuit also struck down class waivers. In *Morris v. Ernst & Young*, the court examined a 'concerted action waiver' requiring employees to pursue legal claims against E&Y exclusively through arbitration and arbitrate only as individuals and in 'separate proceedings'. Like the Seventh Circuit, the Ninth Circuit found that the pursuit of a concerted work-related legal claim falls within Section 7 of the NLRA, and that the 'separate proceedings' clause interfered with the exercise of this right in violation of Section 8(a)(1).[20]

The Ninth Circuit also found that the class waiver was unenforceable under the FAA, which may have consequences for international arbitration agreements generally. The Ninth Circuit noted that, under the FAA, arbitration agreements can be invalidated by 'generally applicable contract defenses […] but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue'. In the class waiver context, the illegality of the 'separate proceedings' clause was found to have nothing to do with arbitration; rather, the problem was that the provision defeats a substantive federal right to pursue concerted work-related legal claims.[21] The Ninth Circuit concluded that the FAA does not mandate the enforcement of a contract that waives such substantive rights.[22]

On the other side of the ledger, in June 2016 the Eighth Circuit reaffirmed its position in *Cellular Sales v. NLRB*, and again held that the class waiver did not violate Section 8(a)(1) of the NLRA.[23] The Second Circuit similarly reaffirmed its position in September 2016 in *Patterson v. Raymours Furniture Co*.[24]

15 See *Sutherland v. Ernst & Young*, 726 F3d 290 (2d Cir 2013); *Owen v. Bristol Care, Inc*, 702 F3d 1050 (8th Cir 2013).

16 *Lewis v. Epic Systems Corp*, 823 F3d 1147 (7th Cir 2016).

17 Ibid. at 1153.

18 Ibid. at 1157.

19 Ibid.

20 *Morris v. Ernst & Young*, 834 F3d 975, 982 (9th Cir 2016).

21 Ibid. at 984-85.

22 Ibid. at 985-86.

23 *Cellular Sales v. National Labor Relations Board*, 824 F3d 772 (8th Cir 2016).

24 *Patterson v. Raymours Furniture Co*, 659 Fed Appx 40 (2d Cir 2016) (reaffirming its 2013 decision in *Sutherland*).

This resulted in a clear split among the circuits, with the Second, Fifth and Eighth Circuits supportive of class waivers and the Seventh and Ninth Circuits against them. The issue has been accepted by the Supreme Court for consideration in the 2017 term, which begins in October.[25]

This past year also saw a key case addressing the question of whether a court or an arbitrator determines if class arbitration is allowed under an arbitration agreement. In *Sandquist v. Lebo Automotive*, the California Supreme Court held that there is no universal rule determining who decides whether class arbitration is allowed; instead, the issue is a matter of party agreement, to be determined on a case-by-case basis.[26] In this case, the Court found that the text of the arbitration agreement was ambiguous and therefore applied state law principles of contractual interpretation to conclude that the arbitrator, not the Court, should determine the issue.[27]

The Court also considered whether the FAA imposes a presumption in favour of the court deciding the issue and concluded that it did not, relying on the Supreme Court's 2003 decision in *Green Tree Financial Corp v. Bazzle*.[28] In *Green Tree*, the majority concluded that whether an agreement permitted class arbitrations was a procedural question that did not fall within the narrow class of 'gateway' questions for a court to decide.[29]

In holding that the issue was to be determined by the arbitrator, the California Supreme Court departed from a recent line of federal court of appeals decisions holding that the issue is to be determined by the court.[30] Many commentators think it likely that the Supreme Court soon will decide to address this issue and resolve the split in authority.

FAA preemption of state law

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held in 2011 that state laws that invalidate arbitration clauses containing class action waivers are pre-empted by the FAA's directive that arbitration clauses be enforced as written.[31] This FAA pre-emption occurs in two situations: '[w]hen state law prohibits outright the arbitration of a particular type of claim', and when a state law rule that is 'normally thought to be generally applicable' nonetheless has a 'disproportionate impact' on arbitration agreements.[32]

Since *Concepcion*, several state courts have found exceptions to FAA pre-emption and declined to enforce arbitration agreements on the basis of defects in the contract's formation.[33] In 2016, the Supreme Court decided a case addressing this issue. It does not involve international transactions, but could affect US arbitration law relevant to them.

25 The Supreme Court has accepted three cases on this issue: *Lewis v. Epic Systems*, *Morris v. Ernst & Young* and *Murphy Oil v. National Labor Relations Board*. A petition for *certiorari* has also been filed in a fourth case, *Patterson v. Raymours Furniture Co.*

26 *Sandquist v. Lebo Automotive*, 376 P3d 506, 511 (2016).

27 Ibid. at 512-14.

28 Ibid. at 516-19.

29 See *Green Tree Financial Corp v. Bazzle*, 539 US 444, 452 (2003).

30 See, e.g., *Dell Webb Communities, Inc v. Carlson*, 817 F3d 867, 873-77 (4th Cir 2016); *Opalinski v. Robert Half Int'l*, 761 F3d 326, 330 (3d Cir 2014); *Reed Elsevier Inc v. Crockett*, 734 F3d 594, 597-99 (6th Cir 2013).

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

32 Ibid. at 341-42.

33 For example, in *Richmond Health Facilities v. Nichols,* 811 F3d 192 (6th Cir 2016), the Sixth Circuit affirmed a Kentucky rule providing that wrongful death beneficiaries are not bound by agreements

In that case, *Kindred Nursing Centers LP v. Clark*, the issue was whether the FAA pre-empts a Kentucky law requiring a power of attorney (PoA) to refer expressly to a power to enter into arbitration agreements to permit the attorney-in-fact to bind her principal to an arbitration agreement. The Kentucky Supreme Court concluded that two PoAs, which granted the representative the power to institute lawsuits and enter into contracts concerning the management of the principal's property and financial affairs, did not grant the authority to enter into arbitration agreements.[34] The Court found that a third PoA did implicitly grant that authority because it contained much broader language granting the power to 'transact, handle and dispose of all matters affecting me and/or my estate in any possible way', and '[g]enerally to do and perform for me in my name all that I might if present'.[35] Despite this finding, the Kentucky Supreme Court chose not to enforce the arbitration agreement, reasoning that the power to waive the 'fundamental constitutional right' to a jury trial must be unambiguously and expressly granted in the text of the PoA.[36] Because the PoA at issue did not expressly grant the power to enter into arbitration agreements, the Court concluded that the residents' representatives lacked the authority to do so.

The Kentucky Court concluded that the FAA did not pre-empt its decision because the FAA's savings clause provides that arbitration agreements need not be enforced if 'grounds [...] exist at law or in equity for the revocation of any contract', and it concluded that no arbitration agreements were formed under Kentucky state law.[37]

The US Supreme Court rejected the Kentucky Court's reasoning.[38] The Court held that the Kentucky Court's rule that the PoA must expressly grant the power to enter into arbitration agreements violated the FAA because it 'singles out arbitration agreements for disfavored treatment'.[39] The Court noted that not only does the FAA pre-empt any state rule discriminating on its face against arbitration, it also displaces any rule that 'covertly

executed by the decedent. The Court found that this rule is not pre-empted by the FAA and *Concepcion* because it does not categorically prohibit arbitration of wrongful death claims, because nothing precludes the deceased's beneficiaries from agreeing to arbitrate the wrongful death claim separately, and it does not have a 'disproportionate impact' on arbitration agreements because it does not threaten to make arbitration more cumbersome, costly and procedurally complicated.

34 Ibid. at 322-26. The first PoA granted the power to 'institute or defend suits concerning my property rights' and 'draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns'. The second PoA granted the power to 'demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor)' and 'make […] contracts of every nature in relation to both real and personal property, including stocks, bonds and insurance'.

35 *Extendicare Homes,* 478 SW3d at 327.

36 Ibid. at 328.

37 Ibid. at 329-30. A federal district court in Kentucky has found that the Kentucky Supreme Court's decision in *Extendicare* violates the FAA. See *Preferred Care of Delaware Inc v. Crocker*, 173 FSupp3d 505, 515 (WD Ky 2016). The court reasoned that '[b]y enacting the requirement that a power of attorney expressly include an attorney-in-fact's authority to enter into a pre-dispute arbitration agreement, the Kentucky Supreme Court […] is singling out arbitration for 'suspect status'. When a power of attorney gives an attorney-in-fact an extremely broad grant of authority or the specific authority to enter into contracts or to institute or defend suits, that authority must include the power to contract for arbitration. 173 FSupp3d at 519-20. The district court reiterated this holding in *Riney v. GGNSC Louisville St Matthews, LLC*, No 3:16CV-00122-JHM, 2016 WL 2853568 (WD Ky 12 May 2016).

38 *Kindred Nursing Centers Limited v. Clark*, No. 16-32 (15 May 2017).

39 Ibid. at 2.

accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements'.[40] The Court also rejected the argument that the Kentucky rule relates to contract formation and therefore the FAA does not apply, holding that '[t]he FAA cares not only about the enforcement of arbitration agreements, but also about their initial validity – that is, about what it takes to enter into them'.[41]

The US Supreme Court's seven-to-one decision is noteworthy because it shows that the conservative and liberal justices are united in their effort to strike down efforts by state courts to evade FAA pre-emption by formulating rules that covertly disfavour arbitration. This pro-arbitration approach is likely to remain consistent going forward, even as the composition of the Court changes in the future.

There were also developments in the case law relating to the California Private Attorney Generals Act (PAGA), a California statute that authorises 'aggrieved employees' to file lawsuits to recover civil penalties on behalf of themselves, other employees and the State of California for Labor Code violations.

The line of cases stems from a 2014 decision by the California Supreme Court in *Iskanian v. CLS Transportation* holding that, where an employment agreement compels the waiver of representative claims under the PAGA, the agreement is contrary to California public policy and unenforceable as a matter of state law.[42] The California Supreme Court also held that a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship; rather, it is a dispute between an employer and the state.[43]

In 2015 the Ninth Circuit confirmed the California state court's decision that the FAA does not pre-empt the *Iskanian* rule on the grounds that it does not prohibit outright the arbitration of PAGA claims, it merely provides that such claims may not be waived; and it does not diminish parties' freedom to select arbitration, it only prohibits them from opting out of the right to act as a private attorney general to recover the full measure of penalties the state could recover.[44] In 2016 the Eastern District of California federal court also confirmed that the FAA does not pre-empt the California state law rule under *Iskanian*.[45]

Six months later, the California Court of Appeal considered whether, notwithstanding the *Iskanian* rule, employers can compel employees to arbitrate individually the predicate issue of whether they are 'aggrieved employees' within the meaning of PAGA before they can litigate the PAGA representative claim in court. The Court concluded that this issue did not fall within the scope of the arbitration agreement because that agreement contained an additional clause stating that the parties would not seek arbitration of any 'claims as a representative […] or in a private attorney general capacity'.[46] The Court further concluded that, even if the issue did fall within the scope of the arbitration agreement, such a provision is unenforceable under California law because, under *Iskanian*, an employer may not force an employee to split a PAGA claim into 'individual' and 'representative' components, with

40 Ibid.

41 Ibid. at 8 (internal quotations omitted).

42 *Iskanian v. CLS Transp LA, LLC*, 327 P3d 129, 148 (Cal Sup Ct 2014).

43 Ibid. at 151.

44 *Sakkab v. Luxottica Retail N Am, Inc*, 803 F3d 425, 434-39 (9th Cir 2015).

45 *Smith v. HFD No 55, Inc*, No 2:15-cv-01293-KJM-KJN, 2016 WL 881134 at *7-8 (ED Cal Mar 7 2016).

46 *Perez v. U-Haul Co*, 207 CalRptr3d 605, 613 (Cal Ct App 2016).

each being litigated in a different forum; nor may the employer impose arbitration provisions that impede an aggrieved employee's ability to bring a PAGA claim.[47] This line of California authority also is likely to raise issues of FAA pre-emption in the future.

Enforcement and recognition of foreign arbitral awards

The enforcement of foreign arbitral awards continued to be an important topic in US arbitration jurisprudence this past year, particularly in the realm of investment arbitration. For the first time, the Second Circuit enforced an arbitral award that had been annulled at the seat of the arbitration. While the Second Circuit had confronted a similar issue before, it had never previously enforced an annulled award.[48]

The underlying procedural history of the case, *Mexicana de Manten v. Pemex-Exploracion*, was described by the court as 'truly unusual'.[49] The claimant, Mexicana de Mantenimiento Integral (COMMISA), was contracted by the respondent Pemex-Exploracion y Produccion (PEP), a state-owned enterprise, to build oil platforms in the Gulf of Mexico. The contracts provided for arbitration as the exclusive means of dispute resolution. During performance of the contracts, PEP seized the platforms, ejected COMMISA from the site and notified COMMISA of its intent to rescind the contracts administratively. COMMISA filed for arbitration in 2004.

In December 2007, while the arbitration was ongoing, the Mexican Congress enacted a law vesting exclusive jurisdiction over claims related to public contracts in the Tax and Administrative Court of Mexico and reducing the statute of limitations on such claims to 45 days. In May 2009, as the arbitration continued, the Congress enacted a law that expressly prohibited arbitration of disputes related to the administrative rescission of contracts. Following these changes, in December 2009 an ICC arbitration panel seated in Mexico issued a final award in favour of COMMISA for approximately $300 million. PEP challenged the award in Mexico, and the Eleventh Collegiate Court of Mexico annulled the award on the basis that rescission of the contracts was not arbitrable under the May 2009 law. COMMISA sought confirmation of the award in the Southern District of New York, which confirmed the award in 2013.[50]

The Second Circuit upheld confirmation of the award, noting that under the Panama and the New York Conventions the recognition and enforcement of an award may be refused only on specific grounds, which include that the 'award […] has been [annulled] or suspended by a competent authority of the country in which, or under the law of which, that award was made'.[51] The Court noted that both Conventions state that even where one of the specific defences is proved, '[t]he recognition and execution of the decision *may* be refused',[52] thus providing discretion to courts to enforce the award notwithstanding the defence. The Court held, however, that this discretion is limited in the US by the doctrine of international

47 Ibid. at 614.

48 See *Baker Marine (Nigeria) Ltd v. Chevron (Nigeria) Ltd*, 191 F3d 194, 197 n3 (2d Cir 1999) ('Recognition of the Nigerian [annulment of the arbitral award] in this case does not conflict with United States public policy').

49 *Corporacion Mexicana de Mantenimiento Integral, S de R de CV v. Pemex-Exploracion y Prod*, 832 F3d 92, 97 (2d Cir 2016).

50 *Corporacion Mexicana de Mantenimiento Integral, S de R de CV v. Pemex-Exploracion y Prod*, 962 FSupp2d 642 (SDNY 2013).

51 Panama Convention, Article V(1)(e); New York Convention, Article V(1)(e).

52 Panama Convention, Article V(1); New York Convention, Article V(1).

comity, which provides that 'a final judgment obtained through sound procedures in a foreign country is generally conclusive […] unless […] enforcement of the judgment would offend the public policy of the state in which enforcement is sought'.[53] A judgment is unenforceable as against public policy if it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought'.[54]

In finding that the Mexican Court's annulment of the arbitration award was against public policy, the Court took into account four considerations.[55] First, it noted the importance of enforcing PEP's agreement to arbitrate and its waiver of immunity in that respect. Second, it found that 'retroactive legislation that cancels existing contract rights is repugnant to the United States law'.[56] Third, it noted that nullification of the arbitral award would leave COMMISA without a forum in which to bring its claims because of the new statute of limitations governing its claims in the Mexican court system. Finally, the Court noted the widely recognised obligation of governments to compensate for the expropriation of property.

A District of Columbia district court facing the same question on a different set of facts came to the opposite result in *In re GETMA International v. Republic of Guinea*.[57] The district court refused enforcement of a foreign award that had been annulled by the Common Court of Justice and Arbitration (CCJA) in Côte d'Ivoire, the institution under whose auspices a tribunal had administered the arbitration proceedings. The annulment was based on the tribunal's request for additional fees from the parties (some of which were paid) beyond those that the CCJA had authorised.

GETMA sought to enforce the annulled award, arguing that the annulment violated US public policy and thus that the award could be enforced pursuant to the New York Convention. In finding that the public policy standard was not met, the district court emphasised that: '[t]he New York Convention does not endorse a regime in which courts routinely second-guess the judgment of a foreign court with competent jurisdiction to annul an arbitral award. Where a foreign court has annulled an arbitral award, a court in this country may only ignore that annulment on limited [...] occasions where extraordinary circumstances have been presented.'[58] The tribunal found that '[a]t worst, the CCJA conceivably abused its discretion – but even such a transgression would be an insufficient ground to ignore the annulment'.[59] The decision underscores that while enforcement of an annulled award is possible, the threshold for doing so is 'high and infrequently met'.[60]

Separately, the Supreme Court declined to clarify a circuit court split on the question of whether an enforcement action can be dismissed on grounds of *forum non conveniens*. The Second Circuit previously refused enforcement of an arbitral award on *forum non conveniens* grounds in *Figueiredo Ferraz v. Peru*,[61] reasoning in that 2011 decision that such a refusal was

53 *Corporacion Mexicana de Mantenimiento,* 832 F3d at 106 (quoting *Ackermann v. Levine*, 788 F2d 830, 837 (2d Cir 1986)).

54 Ibid.

55 Ibid. at 107-112.

56 Ibid. at 108.

57 191 FSupp3d 43 (2016).

58 Ibid. at 50.

59 Ibid. at 51.

60 Ibid. at 49.

61 665 F3d 384 (2d Cir 2011).

justified by the factual circumstances of the case, which had little connection to the US,[62] and was permissible under the Panama Convention, which provides that execution 'may be ordered [...] in accordance with the procedural laws of the country where it is to be executed'. *Forum non conveniens*, the Court held, is a doctrine of 'procedure'[63] and thus applicable in enforcement proceedings. In 2015 and 2016, however, the District of Columbia Circuit rejected *forum non conveniens* as a ground for dismissing an enforcement action in a trio of decisions involving arbitral awards against Belize.[64] The court held that doing so was 'squarely foreclosed by our precedent' and that '*forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations'.[65] Belize filed a petition for a writ of *certiorari* to the Supreme Court on the issue, but the petition was denied.

The Belize decisions are also noteworthy for their rejection of international comity as a basis for refusing enforcement of a foreign arbitral award. In a separate action seeking enforcement of one of the awards, which had been issued by a tribunal sitting in Miami, the Belize Supreme Court decided that Belize could deduct from the award the amount of unpaid taxes owed by the claimant and pay the remainder of the award in Belize dollars. The claimant, Newco Ltd, brought an enforcement action for the full amount of the award in the DC District Court, to which Belize objected on both *forum non conveniens* and international comity grounds. The court found that Belize failed to articulate how enforcement of the award would 'violate the forum state's most basic notions of morality and justice', as required by the public policy exception. It also held that '[a]ny public policy interest in 'international comity' […] does not here override 'the emphatic federal policy in favor of arbitral dispute resolution'.[66]

The DC Circuit issued another pro-enforcement decision in *Diag Human Se v. Czech Republic Ministry of Health*, overturning a district court's decision to deny enforcement of an award against the Czech Republic on grounds of foreign sovereign immunity.[67] The district court had found that the relationship between Diag Humam and the Czech Republic was not a 'commercial' relationship, and that the Foreign Sovereign Immunity Act's (FSIA) arbitration exception thus did not apply. The court of appeals overturned the decision in part on the basis that a commercial relationship need not be contractual.

The subject of the arbitration was an allegedly defamatory letter sent by the Czech Republic to a third party, Novo Nordisk, with which Diag had partnered in its Czech operations. Following receipt of the letter, Novo Nordisk ceased operations with Diag, causing economic losses. Diag brought an action against the Czech Republic in Prague Commercial Court, and the parties agreed to arbitrate their dispute. The US district court found that: '[b]efore entering into the Arbitration Agreement, plaintiff and defendant did not have any

62 Ibid. at 392 ('With the underlying claim arising (1) from a contract executed in Peru (2) by a corporation then claiming to be a Peruvian domiciliary (3) against an entity that appears to be an instrumentality of the Peruvian government, (4) with respect to work to be done in Peru, the public factor of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the Award tips the FNC balance decisively against the exercise of jurisdiction in the United States').

63 Ibid.

64 *Newco Ltd v. Gov't of Belize*, 650 Fed Appx 14 (DC Cir 13 May 2016); *BCB Holdings Ltd v. Gov't of Belize,* 650 Fed Appx 17 (DC Cir 13 May 2016); *Belize Soc Dev, Ltd v. Gov't of Belize*, 794 F3d 99 (DC Cir 2015).

65 See e.g., *Newco Ltd*, 650 Fed Appx at *15.

66 Ibid. at *16. *See also BCB Holdings Ltd,* 650 Fed Appx at 19.

67 824 F3d 131 (DC Cir 2016).

legal relationship, let alone a commercial one. While Diag Human endeavoured to extend its business into the Czech Republic, it did not have any contract, agreement, or transaction with the Czech Republic that could be considered to be commercial.'[68]

In a *de novo* review, the court of appeals found that a commercial relationship did exist between the two parties and thus that the FAA's exception to sovereign immunity applied. The court noted that the parties had entered into an 'informal' framework agreement, under which Diag would supply blood plasma equipment and services to Czech hospitals in exchange for a portion of the plasma produced. As part of the agreement, the Czech Republic undertook obligations to organise and examine donors and store plasma. After entering into the framework agreement, the Republic sought to replace it and opened a bid process to other companies. During the bidding process, the Republic sent the allegedly defamatory letter informing Novo Nordisk that the Republic did not award the contract to Diag because of concerns relating to its business ethics.

The court of appeals found that the framework agreement satisfied the FSIA's arbitration exception, which requires 'a defined legal relationship, whether contractual or not' and that the award 'be governed by a treaty or other international agreement in force for the United States'.[69] The court found that despite being an informal agreement, the framework agreement created a 'defined legal relationship' that was 'commercial' in nature, and therefore the arbitration award was governed by the New York Convention. The court noted that '[i]n the field of international arbitration, 'commercial' refers to matters or relationships, whether contractual or not, that arise out of or in connection with commerce'.[70]

A 2014 ICSID award against Venezuela also has been at the centre of significant procedural drama. The $1.6 billion award in *Venezuela Holdings v. Venezuela* was issued in favour of five Exxon Mobil subsidiaries in relation to their investments in the Cerro Negro and La Ceiba Projects.[71] The tribunal found that Venezuela expropriated the claimants' investments and breached the fair and equitable treatment standard under the applicable Netherlands–Venezuela bilateral investment treaty (BIT).

The day after ICSID issued its award, Exxon Mobil moved successfully to enforce the award through an *ex parte* petition in the Southern District of New York. The order was granted on the basis that New York state law permits *ex parte* recognition of foreign judgments.[72] Venezuela appealed to the Second Circuit, supported by an *amicus* brief from the US government, arguing that notwithstanding any contrary state law, notice of enforcement to the opposing party is required under the FSIA. The Second Circuit is expected to rule in 2017. In the meantime, however, an ICSID Committee annulled the underlying arbitration award in large part in a decision discussed in greater detail below.

Confirmation of arbitral awards

In *CBF Industria De Gusa SA v. AMCI Holdings, Inc*, the Second Circuit clarified the difference between the confirmation and enforcement of arbitration awards and confirmed

68 *Diag Human Se v. Czech Republic Ministry of Health*, 64 FSupp3d 22, 29 (DDC 2014).

69 *Diag Human*, 824 F3d at 134-135.

70 Ibid. at 136.

71 *Venezuela Holdings v. Venezuela* (ICSID Case No ARB/07/27), Award, 9 October 2014.

72 *Mobil Cerro Negro, Ltd v. Bolivarian Republic of Venezuela*, 87 FSupp3d 573 (SDNY 2015).

that award beneficiaries 'are not required to bring an action to confirm their foreign arbitral award before they can seek to enforce it'.[73]

The award was issued by a Paris-seated ICC tribunal against a bankrupt company for more than $48 million. The claimant, CBF, sought an award binding certain non-signatories, but the tribunal declined the request. Facing a respondent with insufficient assets to satisfy the award, CBF brought an enforcement action against the non-signatories in the Southern District of New York. That court dismissed the action, holding that the claimant was required first to obtain confirmation of the award before commencing enforcement proceedings. CBF refiled its claim as a request for confirmation, but the district court again dismissed the action because the respondent, which had been liquidated, no longer existed as a legal entity.

The Second Circuit found that the district court erred in requiring the claimant to confirm its award. The court of appeals distinguished between three types of arbitration awards: domestic, non-domestic and foreign. While the New York Convention applies to both foreign and non-domestic awards,[74] a 'non-domestic' arbitration award is distinguished from a foreign arbitration award in that it (like a domestic award) is issued by a tribunal seated in the US, but applies foreign law or involves foreign entities, foreign property or some other relationship to foreign states. US federal courts exercise primary jurisdiction over both domestic and non-domestic awards because they are made in the US, while US courts have only secondary jurisdiction over foreign arbitral awards.

The court held that domestic and non-domestic arbitration awards must be confirmed, and thus converted it into a local judgment, before they are enforceable. US courts apply domestic arbitration law in deciding to confirm, set aside or modify such an award and turn it into a US judgement for enforcement. Foreign arbitration awards, on the other hand, are subject to enforcement without confirmation by a court at the seat, which can be denied only on the limited grounds set forth by the New York Convention. The court noted that the '[t]he confusion regarding whether parties need to confirm a foreign arbitral award is understandable because Section 207 [of the FAA] uses the term 'confirm' to describe the process by which a district court acts under its secondary jurisdiction to recognize and enforce a foreign arbitral award'.[75] However, the court held that the FAA should be '[r]ead in context' with the New York Convention, which it implements, and that the result is that the term 'confirm' used in the FAA 'is the equivalent of recognition and enforcement as used in the New York Convention for the purposes of foreign arbitral awards'. The court noted that a 'single proceeding […] facilitates the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs'.[76]

This case is discussed further below because of its holdings regarding enforcement of an award against non-signatories.

In *Bayer CropScience v. Dow AgroSciences*,[77] the Federal Circuit confirmed an ICC award of $455 million against Dow in a patent licensing dispute, while modifying the

73 850 F3d 58, 79 (2d Cir 2017).

74 Article I(1) of the Convention states that it applies to 'the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought' and to 'arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'.

75 *CBF Industria*, 850 F3d at 79.

76 Ibid. at 72.

77 2017 US App. LEXIS 3678 (Fed Cir 1 March 2017).

post-judgment interest rate that applied to it. The Federal Circuit noted that 'numerous circuits have concluded that once a federal court confirms an arbitral award, the award merges into the judgment and the federal rate for post-judgment interest presumptively applies' unless there is 'unambiguous evidence of the parties' or arbitrators' contrary intent'.[78] Despite the fact that the award provided for 'post-award interest' at a rate of 8 per cent 'until full payment', the court found that the award was not focused on the distinction between post-award and post-judgment interest, and thus did not provide sufficiently 'clear evidence to displace the federal statutory rate' for post-judgment interest.[79]

In *David Wulfe v. Valero Refining Company-California*, the Ninth Circuit confirmed an arbitral award in a California PAGA dispute.[80] This case involves a domestic arbitration, but may nonetheless be relevant to international arbitrations because it sheds light on whether intervening case law can provide grounds for vacating an award.

In *David Wulfe*, the arbitrator had issued a partial award ordering Wulfe to proceed with his PAGA claim on an individual (rather than class representative) basis. The district court confirmed the partial award, and Wulfe appealed the decision to the Ninth Circuit. While that appeal was pending, the California Supreme Court and Ninth Circuit issued rulings holding that waivers of the right to bring representative PAGA claims are unenforceable (this line of cases is discussed above).

The Ninth Circuit remanded to the district court to consider the intervening case law, and on remand the district court found that the intervening case law did not provide any basis for vacating the award. The Ninth Circuit agreed with the lower court's conclusion, reasoning that in determining whether there has been 'manifest disregard of the law' sufficient to vacate an award, the issue is not whether, with perfect hindsight, the arbitrator erred, but rather whether the arbitrator recognised the applicable law and then ignored it.[81] The court found that the arbitrator did not do so in that case, because at the time she rendered the partial award the law was still unsettled as to whether the PAGA claim should be arbitrated on an individual or class basis.[82]

Non-signatories

The Southern District of New York court confirmed an ICC award against a Brazilian insurance company that was not party to the underlying arbitration agreement on the basis that the insurance company had stepped into the shoes of its insured and thus assumed all of its rights and obligations, including its obligation to arbitrate disputes with the respondent.[83] The arbitration agreement between Alstom Brasil Energia e Transporte Ltd and Alumina do Norte do Brasil was part of a contract for the supply of steam generation units by Alstom. When those units malfunctioned and caused damage to Alumina's facilities, Alumina made an insurance claim with its insurer Mitsui Sumimoto Seguros SA, which paid more than $24 million for the damage. Alumina also entered into an agreement with Alstom settling all claims related to the incident.

78 Ibid. at *30.

79 Ibid. at *31.

80 No. 16-55824, 2017 WL 1396685 (9th Cir 19 April 2016).

81 Ibid. at *2.

82 Ibid.

83 *Alstom Brasil Energia e Transporte Ltda v. Mitsui Sumitomo Seguros SA*, 2016 US Dist LEXIS (SDNY 20 June 2016).

Mitsui sued Alstom in Brazilian courts to recover the indemnity payment. Alstom then initiated ICC arbitration in New York, invoking the arbitration agreement between itself and Alumina. The tribunal found that the arbitration agreement between Alstom and Alumina obligated Mitsui to arbitrate the dispute, and that the settlement agreement Alumina had entered into with Alstom, which foreclosed any claims related to the incident at issue, also bound Mitsui. Alstom sought confirmation of the award in the Southern District, and Mitsui moved to dismiss.

The court rejected Mitsui's motion and confirmed the award on the basis of US federal arbitration law, which provides that 'an insurer-subrogee stands in the shoes of its insured'. Thus, 'if the named plaintiffs would be required to submit the controversy to arbitration, then the insurer will be similarly bound'.[84] The court rejected Mitsui's argument that Brazilian law should apply to determine its rights as a subrogee, despite the fact that the contract contained a Brazil choice of law clause. The court held that it would apply the choice of law rules of its own forum, which placed weight on what the parties intended. The court noted that the choice of law clause selected Brazilian law 'only to the extent such law is consistent with the Articles of this Agreement'. The court concluded that the parties' selection of New York as the seat of the arbitration established that they expected US federal arbitration law to apply to the question of arbitrability and the rights and obligations of non-signatories.

Another case in the Southern District of New York addressed the question of whether an award could be confirmed against non-signatories where doing so required piercing the corporate veil. In *GE Transp Co v. A-Power*,[85] the court found that confirmation was 'not the proper time to pierce the corporate veil' but left open the door to doing so through a separate enforcement action. GE sought confirmation and enforcement of a $360 million award issued by a Hong Kong International Arbitration Centre tribunal against the respondent A-Power, as well as against A-Power's chair and other related entities that were not signatories to the arbitration clause. The court confirmed the award against A-Power, but not the other entities, finding that doing so would unduly complicate the confirmation process, which is procedurally similar to a motion for summary judgment. The court cited a Second Circuit opinion, which held that the confirmation process 'is one where the judge's powers are narrowly circumscribed and best exercised with expedition. It would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported 'alter ego'.'[86] The court nevertheless noted that it was 'troubled by the practical reality that [its] more limited ruling here' would not prevent efforts to evade payment of the award.[87]

The Second Circuit, on the other hand, held in another case that a foreign arbitral award could be enforced directly against non-signatories even where the arbitral tribunal had considered and rejected binding those third parties to the arbitration. In *CBF Industria de Gusa SA v. AMCI Holdings, Inc*,[88] which is discussed in detail above, the court of appeals noted that the New York Convention provides that a signatory state 'shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where

84 Ibid. at *13.

85 2016 US Dist LEXIS 81367 (SDNY 22 June 2016).

86 *Orion Shipping & Trading Co v. E States Petroleum Corp of Panama*, 312 F2d 299, 201 (2d Cir 1963).

87 *GE Transp* Co, 2016 US Dist LEXIS 81367 at *25.

88 850 F3d 58 (2d Cir 2017).

the award is relied upon, under the conditions laid down in the following articles'. Thus, 'the question of whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability, or any other legal principle concerning the enforcement of awards or judgments, is one left to the law of the enforcing jurisdiction',[89] which includes the New York Convention. The court noted that the non-signatories could avoid enforcement only on one of the five bases for refusal to enforce a foreign arbitral award under Article V(1) of the Convention or by showing, in accordance with Article V(2), that the dispute was not arbitrable under US law or that enforcement was contrary to US public policy. The court remanded the case to the district court with instructions to determine whether the non-signatories could show an exception to enforcement under the New York Convention.

Non-statutory grounds for vacatur of awards

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

The manifest disregard doctrine was born from Supreme Court *dicta* in 1953: '[T]he interpretations of the law by the arbitrators in contrast to manifest disregard [of the law], are not subject, in the federal courts, to judicial review for error in interpretation.'[90] In 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.[91] In 2008 in the *Hall Street* case, the Supreme Court – again in *dicta* – questioned the validity of the manifest disregard ground:

> *Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the [FAA] Section 10 grounds collectively, rather than adding to them […]. Or, as some courts have thought, 'manifest disregard' may have been shorthand for [Section] 10(a)(3) or [Section] 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers […].' We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment […] and now that its meaning is implicated, we see no reason to accord it the significance that [petitioner] urges.*[92]

89 Ibid. at 75.

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

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

92 *Hall St Assocs, LLC v. Mattel, Inc*, 552 US 576, 585 (2008). See also Gary Born, *International Commercial Arbitration* 1124–1206 (Second Edition 2014), discussing *Hall Street* and 'manifest disregard' under the FAA.

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'.[93] It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived *Hall Street*.[94]

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.[95] The Second and Ninth Circuits (which include New York and California), meanwhile, have held that manifest disregard is simply a judicial gloss on the FAA's statutory grounds for *vacatur* and have continued to apply their manifest disregard jurisprudence[96] Both circuits have found that a high standard must be met for the doctrine to apply.[97] The Fourth Circuit ruled that the manifest disregard doctrine is still viable,[98] 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)'.[99] The Sixth Circuit found that, in addition to the grounds provided by the FAA, a court can vacate an arbitral award 'in the rare situation in which the arbitrators 'dispense [their] own brand of industrial justice', by engaging in manifest disregard of the law'.[100] Most of the remaining circuits have

93 *Hall Street*, 552 US at 588.

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

95 See *Citigroup Global Mkts Inc v. Bacon*, 562 F3d 349, 355 (5th Cir 2009) ('Hall Street unequivocally held that the statutory grounds are the exclusive means for *vacatur* under the FAA […]. Thus, to the extent that manifest disregard of the law constitutes a non-statutory ground for *vacatur*, it is no longer a basis for vacating awards under the FAA'.); *AIG Baker Sterling Heights, LLC v. Am Multi-Cinema, Inc*, 579 F3d 1268, 1271 (11th Cir 2009) (Hall Street 'confirmed [… that Sections] 10 and 11 of the FAA offer the exclusive grounds for expedited *vacatur* or modification of an award'). The Eighth Circuit has stated that it had 'previously recognized the holding in Hall Street and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA'. *Med Shoppe Int'l, Inc v. Turner Invs, Inc*, 614 F3d 485, 489 (8th Cir 2010). Lower courts have interpreted this statement as a repudiation of manifest disregard. See *Jay Packaging Grp, Inc v. Mark Andy, Inc*, 2011 WL 208947, at *1 (ED 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'.).

96 See *Stolt-Nielsen SA*, 548 F3d at 94–95 (noting that the *Hall Street* court speculated that manifest disregard was 'shorthand' for the FAA's statutory grounds for *vacatur*); *Comedy Club, In v. Improv West Assocs*, 553 F3d 1277, 1290 (9th Cir 2009) (*Hall Street* listed several possible readings of manifest disregard, including the Ninth Circuit's long-standing interpretation that it is equivalent to Section 10(a)(4) of the FAA).

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

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

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

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

> *A mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal precedent. As long as a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. It is only when no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.*

produced contradictory or non-committal manifest disregard jurisprudence.[101] For example, the First Circuit acknowledged that there is a circuit split on whether manifest disregard is a viable doctrine and also noted that, while it had previously stated in *dicta* that the doctrine is no longer available, it had not squarely addressed the issue.[102]

The split in the federal circuit courts over the validity of the 'manifest disregard of the law' standard has been reflected in state courts applying state law. The Texas Supreme Court recently resolved a split among the Texas lower courts by holding that manifest disregard of the law does not constitute a basis for vacating awards under Texas law. In *Hoskins v. Hoskins*, that court noted that '[t]he statutory text [of the Texas Arbitration Act] could not be plainer: the trial court 'shall confirm' an award unless *vacatur* is required under one of the enumerated grounds in Section 17.088'. Thus, the court held that 'the TAA leaves no room for courts to expand on those grounds, which do not include an arbitrator's manifest disregard of the law'.[103]

However, in a case that seems to be a departure from the majority trend, the Seventh Circuit in *Bankers Life & Casualty Insurance Company v. CBRE, Inc* vacated an arbitral award under the State of Illinois Arbitration Act for 'gross errors of judgment in law or a gross mistake of fact' that were 'apparent upon the face of the award'.[104] While the court applied the Illinois Arbitration Act, that law mirrors the FAA with respect to *vacatur*, allowing *vacatur* where the arbitrators 'have exceeded their powers'.[105] As noted above, the Seventh Circuit has previously rejected the manifest disregard of the law as a basis for *vacatur* under the FAA except under circumstances where an award required the parties to act illegally,[106] thus raising the question of whether a shift in that court's jurisprudence with respect to the FAA is on its way.

Arbitrator disqualification

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

101 For the First Circuit, compare *Ramos-Santiago v. United Parcel Servs*, 524 F3d 120, 124 n3 (1st Cir 2008) ('[M]anifest disregard of the law is not a valid ground for vacating or modifying an arbitral award […] under the [FAA]'), with *Kashner Davidson SEC Corp v. Mscisz*, 601 F3d 19, 22 (1st Cir 2010) ('[We] have not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*'). See also *Republic of Arg v. BG Grp PLC*, 715 FSupp2d 108, 116 n7 (DDC 2010) ('A question remains, however, as to whether this basis [manifest disregard] for vacating an arbitral award survived the Supreme Court's recent decision in *Hall Street*'), rev'd, 665 F3d 1363 (DC Cir 2012); *Paul Green Sch of Rock Music Franchising, LLC v. Smith*, 389 F Appx 172, 177 (3d Cir 2010) ('Based on the facts of this case, we need not decide whether manifest disregard of the law remains, after *Hall Street*, a valid ground for *vacatur*'); *Hicks v. Cadle Co*, 355 F Appx 186 (10th Cir 2009) (no need to decide whether manifest disregard survives *Hall Street* because petitioners have not demonstrated it).

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

103 *Hoskins v. Hoskins*, 487 SW 3d 490, 494 (Sup Ct Tx 2016).

104 830 F3d 729, 732 (7th Cir 2016).

105 710 Ill Comp Stat 5/12(a)(3).

106 See *Johnson Controls, Inc v. Edman Controls, Inc*, 712 F3d 1021, 1026 (7th Cir 2013).

In 2017 the Second Circuit rejected challenges to the confirmation of an award for the alleged 'evident partiality' of the chair of a tribunal in an insurance arbitration between National Indemnity Co (NICO) and IRB Brasil Reseguros.[107] IRB Brasil sought *vacatur* of the $168 million award against it on the grounds that the chair of the tribunal had been appointed in two other arbitrations by a NICO affiliate. The court found that the appointments did not give rise to 'evident partiality' under the FAA, which is only present where 'a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one side'.[108] The court noted that the arbitrator had no 'familial, business, or employment relationship with NICO' or its affiliate and had no 'financial interest in the outcome of his arbitrations'.[109]

The DC Circuit also rejected a 2017 challenge to the enforcement of an award based on alleged 'evident partiality' of an arbitrator.[110] A member of an LCIA tribunal shared chambers with another barrister who advised a partial owner of the claimant and represented other clients adverse to Belize. Belize challenged enforcement of the award in the DC Circuit on the basis that 'if the rules applicable to US law firms were applied to Douglas and Matrix Chambers' it would be 'undisputed that bias and lack of impartiality' tainted the award. In rejecting the challenge, the DC Circuit noted that English Chambers are not US law firms, but rather composed of solo practitioners who do not share assets, liabilities and confidential client information. While the New York Convention public policy exception called for replacing 'foreign ethical standards with United States public policy in scrutinizing an arbitral award…[it] does not give us license to replace the *facts* of a case with an Americanized version thereof'.[111]

On the other hand, a federal district court in New York vacated an award on the basis of evident partiality of an arbitrator, reasoning that the arbitrator had failed to disclose material relationships with Insurance Company of America (ICA), the party that appointed him.[112] The arbitrator failed to disclose that he had hired ICA's treasurer, secretary and director as his company's chief financial officer just months prior to the hearing in the arbitration. The arbitrator also failed to disclose that his company operates from the same office suite as ICA, which the court found suggested a material conflict of interest.[113] The court concluded that these undisclosed relationships were significant enough to demonstrate evident partiality, and therefore *vacatur* was appropriate.[114]

Fraud

In *CBF Industria de Gusa SA v. AMCI Holdings, Inc*,[115] the Second Circuit reversed and remanded a district court's decision that CBF was estopped from asserting fraud claims against alter egos because those claims had been litigated and denied by the ICC tribunal. The court noted that while issue preclusion applies to issues resolved in arbitration, it will

107 *Nat'l Indem Co v. IRB Brasil Reseguros SA*, 2017 US App LEXIS 1686 (2d Cir 31 January 2017).

108 Ibid. at *4.

109 Ibid. at *4-5.

110 *Belize Bank Ltd v. Gov't of Belize, 2017 US App LEXIS 5587* (DC Cir Mar 31 2017).

111 Ibid. at *10 (emphasis in original).

112 *Certain Underwriting Members of Lloyd's of London v. Insurance Company of the Americas*, Case 1:16-cv-00374-VSB (SDNY Mar 31 2017).

113 Ibid. at 20.

114 Ibid.

115 850 F3d 58 (2d Cir 2017).

apply only where the parties had a 'full and fair opportunity to litigate the issue in a prior action'.[116] While an ICC tribunal had ruled on the issue, CBF alleged that the alter egos had misled the tribunal regarding the nature of their alleged fraud. The court held that this allegation, taken at face value, was sufficient to warrant fact discovery into whether CBF did indeed have a 'full and fair opportunity to litigate' its fraud claim in the arbitration, and remanded the case for discovery on the issue.

In another case involving allegations of fraud, the DC Circuit affirmed the district court's enforcement of an ICC award despite allegations that the award facilitated a fraud committed by the parent company of the claimant.[117] An ICC tribunal had issued an award of approximately $11 million to Enron Nigeria Power Holding (ENPH) for contractual breaches committed by the National Electric Power Authority of Nigeria (NEPAN) in relation to the construction of electrical facilities. In calculating damages, the tribunal found that the collapse of Enron, ENPH's parent company, due to financial fraud, would have impeded ENPH's ability to perform the contract, and the tribunal reduced the damages it awarded for that reason. NEPAN argued that confirmation of the reduced damages award would be contrary to US public policy, as it would facilitate Enron's fraud. The court rejected that argument, deferring to the tribunal's finding that the fraud, while relevant to the calculation of damages, was not connected to NEPAN's entry into or breach of the contract. Thus, the court found that the facts did not satisfy the '[t]he public policy defense under Article V(2)(b) of the New York Convention[, which] is to be construed narrowly and is available only where an arbitration award tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property'.[118]

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

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

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

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

d the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.[120]

116 Ibid. at 77.

117 *Enron Nigeria Power Holding, Ltd v. Fed Republic of Nigeria*, 844 F3d 281 (DC Cir 2016).

118 Ibid. at 289.

119 '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).

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

Older cases suggested that a foreign arbitration did not fall within the statute's purview, which was thought only to include foreign judicial proceedings.[121] 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.[122] In so finding, the Court noted that in 1964 Congress had replaced the term 'judicial proceeding' in the statute with 'tribunal'. The Court quoted approvingly from the related legislative history, which 'explain[ed] that Congress introduced the word 'tribunal' to ensure that 'assistance is not confined to proceedings before conventional courts', but extends also to 'administrative and quasi-judicial proceedings".[123] The Court also relied on a definition of 'tribunal' that included arbitral tribunals.[124]

Since *Intel*, courts have split on whether Section 1782 permits discovery in aid of a foreign arbitration. The key issue has been whether a foreign arbitration constitutes a 'proceeding in a foreign or international tribunal' for purposes of the statute. Some precedents distinguish investment treaty arbitration, which arguably falls within the statute because the fora are state-sponsored, from 'purely private' commercial arbitration, which arguably does not come within the statute.[125]

This past year was no exception to such split, with courts in the Second Circuit and Seventh Circuit ruling in different directions on this issue. In *In re Ex Parte Application of Kleimar*, Kleimar sought discovery in connection with arbitrations in London before London Maritime Arbitration Association (LMAA) tribunals.[126] The Southern District of New York court held that the LMAA is a 'foreign tribunal' within Section 1782. The court noted that its holding conflicted with previous decisions issued by the Second Circuit, including *National Broadcasting Co v. Bear Sterns*.[127] However, it found the Supreme Court's decision in *Intel Corp*, issued after that decision, merited revisiting the question, as *Intel Corp* 'suggests that the Supreme Court may consider foreign arbitrations […] within the scope of Section 1782'.[128] The district court thus refused to quash the discovery subpoena. The ruling has not been appealed to the Second Circuit. Whether the Second Circuit will adopt the same reasoning or maintain its holding in *National Broadcasting* therefore is uncertain.

Conversely, in a Northern District of Illinois case, *In re Application of TJAC Waterloo*, TJAC sought discovery in aid of an expert determination proceeding in London. The court held that an English expert determination proceeding is not a Section 1782 tribunal. The court acknowledged that there is conflicting law on whether private arbitral bodies constitute

121 See *NBC v. Bear Stearns & Co*, 165 F3d 184, 188 (2d Cir 1999) ('the fact that the term 'foreign or international tribunals' is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that the term, as used in [Section] 1782 does include both'). See also *In re Republic of Kazakhstan v. Biedermann Int'l*, 168 F3d 880 (5th Cir 1999); *In re Medway Power Ltd*, 985 FSupp 402 (SDNY 1997).

122 *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.

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

124 Ibid. at 258.

125 For a recent discussion of this issue see *In re Gov't of Lao People's Democratic Republic*, 2016 US Dist LEXIS 47998 (DN Mar I 7 April 2016).

126 2016 US Dist LEXIS 165297, at *5-6 (SDNY 16 November 2016).

127 165 F3d 184, 190 (2d Cir 1999).

128 *In re Ex Parte Application of Kleimar NV*, 2016 US Dist LEXIS 165297 at *5-6.

Section 1782 tribunals, but the law of the Seventh Circuit led it to conclude that an English expert determination is not a Section 1782 tribunal.[129] In a previous decision in 2009, the same court had held that a private English arbitral tribunal did not fall within the scope of Section 1782 because it was not a state-sponsored arbitral body and its decisions were only subject to judicial review in very narrow circumstances.[130] Following the same reasoning, the court concluded that an English expert determination does not fall within Section 1782 because it is a private, rather than state-sponsored, arbitral body, and the scope of judicial review of the English expert's determinations is quite narrow and limited to procedural matters.[131]

ii Class action waivers in arbitration clauses in the financial industry

As noted above, Supreme Court precedent permits companies to insulate themselves from class actions by including class action waivers in arbitration clauses. The Court has found that state law and contract interpretations prohibiting such waivers are pre-empted by the FAA.

In 2015, the US Consumer Financial Protection Bureau (CFPB) published for comment proposed rules regarding arbitration in financial products and services consumer contracts. The rules included making arbitration agreements inapplicable to cases filed in court on behalf of a class; giving consumers the option of litigating class actions in court or in arbitration; and collecting and publishing arbitration claims and awards on the CFPB website.

In May 2016, the CFPB published for comment another proposed set of rules regarding arbitration. The proposed rules would prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court. The proposed rules also would require providers that use pre-dispute arbitration agreements to submit certain records relating to arbitral proceedings to the CFPB. The CFPB intends to publish these materials on its website and use this information to continue monitoring arbitral proceedings to determine whether there are consumer protection concerns that may warrant further action from the CFPB.[132]

The comment period for the proposal ended on 22 August 2016. As of December 2016, the CFPB was still in the process of reviewing comments and reportedly was planning to issue a final rule in early 2017. However, as of the time of publication, the CFPB still has not issued a final rule.[133]

However, any final rule the CFPB may issue may be challenged as a result of the DC Circuit's decision in *PHH Corp v. Consumer Financial Protection Bureau*.[134] In that case, the DC Circuit held that the structure of the CFPB is unconstitutional because it is an independent agency whose director possesses authority that is unchecked by the President or other agency leaders.[135] To remedy the constitutional defect, the court severed the removal-only-for-cause provision from the Dodd-Frank Act (the statute creating the CFPB)

129 *In re TJAC Waterloo LLC*, Case No 3:16-mc-9-CAN, 2016 WL 1700001 at *2 (ND Ill 27 April 2016).

130 *In re Arbitration between Norfolk S Corp, Norfolk S Ry Co, & Gen Sec Ins Co & Ace Bermuda Ltd*, 626 FSupp2d 882, 885, 886 (ND Ill 2009).

131 *In re TJAC Waterloo LLC*, 2016 WL 1700001 at *2.

132 Docket No CFPB-2016-0020; files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf.

133 www.consumerfinance.gov/about-us/blog/fall-2016-rulemaking-agenda.

134 839 F3d 1 (DC Cir 2016).

135 Ibid. at 8.

so that the President would have the power to remove the director at will and to supervise and direct the director.[136] As a result of this structural change, the CFPB is no longer an 'independent agency' and instead 'now will operate as an executive agency'.[137]

Executive agencies, however, are required to submit proposed and final regulations constituting a 'significant regulatory action' to the Office of Information and Regulatory Affairs (OIRA) for review prior to publication in the Federal Register.[138] Because the CFPB's proposed rules on arbitration are likely to qualify as 'significant regulatory action', any final rule that the CFPB issues may be challenged on the grounds that it has not been submitted to OIRA for its review.

At present it is unclear whether the DC Circuit's order in *PHH Corp* will stand. In February 2017, the DC Circuit granted a rehearing *en banc* and vacated the panel's order.

iii Investment treaty cases involving the US or US nationals

In March 2017 an ICSID committee annulled $1.4 billion of the $1.6 billion award that a tribunal had issued against Venezuela in favour of five Exxon Mobil subsidiaries.[139] As noted above, the tribunal found that Venezuela expropriated investments related to the Cerro Negro and La Ceiba Projects. The compensation awarded by the tribunal included approximately $9 million for production and export curtailments imposed on the projects, $1.4 billion for expropriation of investments in Cerro Negro and another $180 million for expropriation of investments in La Ceiba. The tribunal determined the $1.4 billion portion of the award by reference to a BIT's requirement for 'just compensation', which 'represent[s] the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is earlier'.[140]

The annulment committee found that the tribunal manifestly exceeded its powers by failing to consider applicable national law and contractual provisions, which together established a price cap on compensation for government action affecting the project. The tribunal had dismissed the relevance of the price cap in calculating compensation on the basis that national law does not displace and cannot be used as an excuse for non-compliance with international law. However, the annulment committee ruled that determining that national law does not displace international law 'is not at all synonymous with determining that [national laws] have no relevance for the ascertainment of the content and consequences of [international] obligations'. The committee ruled that the price cap was relevant to defining the content and value of the investment and thus informing the standard of just compensation under international law. The tribunal's disregard of the national and contractual provisions establishing the price cap was not within its powers and merited an annulment of that portion of the award.

136 Ibid. at 8-9.

137 Ibid. at 39.

138 See Executive Order No 12866, 58 FR 51735 (4 October 1993). The Executive Order defines a 'significant regulatory action' as any regulatory action that is likely to result in a rule that may 'have an annual effect on the economy of $100 million or more', 'adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, tribal governments or communities', or raise other coordination, budgetary, or policy issues, such as creating a serious inconsistency with another agency's action.

139 *Venezuela Holdings v. Venezuela* (ICSID Case No ARB/07/27), Decision on Annulment, 9 March 2017.

140 *Venezuela Holdings v. Venezuela* (ICSID Case No ARB/07/27), Award, 9 October 2014, Paragraph 307.

In a 2016 award, an ICSID tribunal ruled two to one in *Philip Morris v. Uruguay* that Uruguay's tobacco regulations did not violate the Switzerland–Uruguay BIT.[141] While the claim was brought by a Swiss subsidiary, Philip Morris International, the subsidiary's parent company is a US corporation.[142] The arbitration has been at the centre of significant US and international attention due to its potential implications for the power of states to regulate for the benefit of public health and welfare.[143] The award is significant for its confirmation of state regulatory powers and for its potential relevance to debate over the investment treaty regime, which recently has been subject to increased scrutiny.[144]

At the heart of Philip Morris' claim was its challenge to Uruguay's single presentation requirement, which prohibited cigarette companies from marketing more than one variant of cigarette per brand family, and Uruguay's mandate that cigarette packaging carry large graphic health warnings that left only 20 per cent of the package for branded imaging. Philip Morris argued that these regulations violated Uruguay's obligations under the BIT, including its obligations to provide fair and equitable treatment to protected investors. In a controversial request for relief, Philip Morris asked that the tribunal order Uruguay to withdraw the challenged regulations or award damages to compensate for them.

Uruguay countered that the measures were directed toward promoting public health, were well within its regulatory powers as a sovereign state and were non-discriminatory, as they applied to all tobacco manufacturers.

The tribunal sided with Uruguay, finding that the measures were within Uruguay's regulatory powers and did not violate the BIT. In a partial dissent, arbitrator Gary Born found that the single presentation requirement was arbitrary and disproportionate, and thus a violation of the fair and equitable treatment standard.

III OUTLOOK AND CONCLUSIONS

The past year has been a busy time for the development of arbitration law in the United States. As a large country with a high volume of international arbitration, the US generates case law that sometimes shows differences among the various circuit courts in one aspect or another of the law. The continuing development of that law nevertheless takes place in the presence of a highly favourable judicial attitude towards international arbitration.

141 (ICSID Case No ARB/10/7), Award, July 2016.

142 Ibid. at Paragraph 6.

143 See, e.g., 'Cigarette Giants in Global Fight on Tighter Rules', *NY Times*, 13 November 2010.

144 See, e.g., 'Trans-Pacific Partnership Seen as Door for Foreign Suits Against US', *NY Times*, 25 March 2015.

Appendix 1

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