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PREFACE

I am delighted to have taken on the editorship of *The International Arbitration Review* and to present this latest edition in the series.

Those of us who practise in the field of international arbitration are fortunate to have a seemingly endless supply of topical literature at our fingertips. Comprehensive treatises, scholarly journals and articles, and online resources covering the latest arbitration developments are readily accessible to a global audience.

But what if one wants to understand the law and practice of international arbitration through a more focused, jurisdiction-specific lens, while at the same time ensuring that the information one receives is of the highest quality and reflects the latest developments?

That is where this volume comes in. It fills a niche by undertaking a thorough analytical review of arbitration developments over the past year in the world's leading arbitration jurisdictions (and some that are on the ascent). Written by leading practitioners from around the world, the chapters in this volume put recent arbitration developments in the context of each jurisdiction's legal arbitration structure, and provide expert commentary on the most important legislative and judicial developments. They do so in a manner designed to be maximally useful for practitioners, in-house counsel and academics alike.

As in previous editions, the chapters in this volume address developments in both international commercial arbitration and investor–state arbitration, and seek to provide current information on both of these species of international arbitration. Throughout this volume, important investor–state arbitration developments in each jurisdiction are treated as a separate but closely related topic.

I thank all of the authors for their excellent contributions to this volume and welcome any comments or suggestions from readers as to how this volume might be usefully expanded or improved in future editions.

John V H Pierce
Latham & Watkins LLP
New York
June 2023

Chapter 31

UNITED STATES

John V H Pierce, Santiago Bejarano and Florian Loibl[1]

I INTRODUCTION

As a general matter, US courts continue to provide robust support to international arbitration. This chapter provides an overview of recent US legal developments in the field of arbitration, with a focus on international arbitration. First, we provide general background on the US legal system and the structure of arbitration law in the United States. We then cover the most relevant developments over the past year, including notable Supreme Court decisions that have addressed matters relating to arbitration, as well as decisions of federal courts on key issues such as enforcement and recognition of arbitral awards, vacatur or setting aside of arbitral awards, and 'arbitrability'. The chapter also addresses recent developments relating to investor–state arbitrations involving the United States and outlines certain academic developments of importance in the field.

i The structure of the US court system

The US court system includes a federal system and 50 state systems (plus the District of Columbia and territorial courts) with overlapping jurisdictions. The federal system is composed of district courts (courts of first instance), intermediate courts of appeal organised by 'circuits' covering different geographical areas, and the US 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 courts of last resort. There are no specialist tribunals in the federal or state systems that deal solely with arbitration law, although certain states have made provision for special handling of international arbitration matters in certain of their state courts.[2] Because of the structure of US law, most cases involving international arbitration are heard and decided by the federal courts.

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1 John V H Pierce is a partner and global co-chair of the international arbitration practice, Santiago Bejarano is a counsel and Florian Loibl is an associate at Latham & Watkins LLP. The authors would like to thank and acknowledge the contributions of James H Carter, an independent arbitrator, and Claudio Salas, of Wilmer Cutler Pickering Hale and Dorr LLP, who prepared prior versions of this chapter in earlier editions of this review.

2 For example, Section 202.70(b)(12) of the Uniform Rules for the New York State Trial Courts provides that the Commercial Division of the New York Supreme Court will hear '[a]pplications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief pursuant to CPLR Article 75' in commercial disputes exceeding a certain monetary threshold (US$500,000 in Manhattan or New York County) or, regardless of the amount in dispute, '[w]here the applicable arbitration agreement provides for the arbitration to be heard outside the United States'. By Administrative Order dated

ii The structure of arbitration law in the United States

The Federal Arbitration Act (FAA) governs most types of arbitrations in the United States, regardless of the subject matter of the dispute. It is by no means a modern statute, nor is it comprehensive. It is not modelled on more modern proposals like the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law) that have been adopted in many jurisdictions. The FAA's limited scope provides a framework that applies to arbitrations mostly 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'.[3] Upon the application of any party, judicial proceedings are stayed as to any issues determined to be subject to arbitration.[4] 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. In general, these grounds are designed to prevent fraud, excess of jurisdiction or procedural unfairness, rather than to second-guess the merits of the arbitral tribunal's decision.[5]

The FAA's largely hands-off approach reflects US federal policy favouring arbitration as an alternative to sometimes congested, ponderous and inefficient courts.[6] In the international context, this pro-arbitration policy is evidenced by the implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Inter-American Convention on International Commercial Arbitration (the Panama Convention) in Chapters 2 and 3, respectively, of the FAA.[7]

Notwithstanding the continued use of 'pro-arbitration' to describe the position of US federal courts towards arbitration, it is important to highlight that the Supreme Court has, in recent decisions, suggested that this federal policy should not be understood too broadly and is intended to ensure that arbitration agreements are enforced on an equal footing with other contracts, and that the interpretation of arbitration agreements adheres to the same canons of contractual interpretation applicable to any commercial agreement.[8]

19 August 2020, all international arbitration matters filed in the First Judicial District, which is located in Manhattan, that fall within Section 202.7(b) shall be assigned to Commercial Division Judge Barry R Ostrager.

3 FAA, 9 U.S.C.A. § 2.

4 FAA, 9 U.S.C.A. § 3.

5 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 FAA, 9 U.S.C.A. § 10.

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

7 See FAA, 9 U.S.C.A. § 201–08, 301–307.

8 See discussion at Section II.i.

State law, by comparison, plays a reduced role in the regulation of arbitrations in the United States – in particular, as it relates to international disputes. 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.[9] 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 United States

As a general matter, there are no significant distinctions at the federal level between international and domestic arbitration law.[10] The FAA, which incorporates the New York and Panama Conventions, gives federal courts an independent basis of jurisdiction over any action or proceeding that falls under these treaties, opening the federal courts to international parties that otherwise would have to demonstrate an independent basis for federal jurisdiction.[11] Some states have international arbitration statutes that purport to govern only international arbitrations taking place in those states. As previously mentioned, these state statutes are pre-empted by the FAA to the extent that they are inconsistent with it and are thus of limited relevance to international arbitration.

II THE YEAR IN REVIEW

i US court decisions affecting international arbitration

Supreme Court decisions

During its 2021–2022 term, the Supreme Court addressed arbitration issues twice – first, in the consolidated cases of *ZF Automotive US, Inc, et al. v. Luxshare, Ltd* and *AlixPartners, LLP, et al. v. The Fund for Protection of Investors' Rights in Foreign States*; then, in the *Morgan v. Sundance* case. Notably, each of these cases was decided by a unanimous court.

9 See *Allied-Bruce Terminix Cos, Inc v. Dobson*, 513 U.S. 265, 277 (1995) (holding that Section 2 of the FAA 'exercise[s] Congress' commerce power to the full' and that the FAA pre-empts state policy that would put arbitration agreements on an unequal footing); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that the FAA pre-empts a California rule classifying most collective arbitration waivers in consumer contracts as unconscionable).

10 Some authorities argue that, to the extent that manifest disregard of the law 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 Section II.i, 'Non-statutory grounds for vacatur of awards'.

11 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 U.S. 49 (2009).

The ZF Automotive case and the use of Section 1782 applications in aid of international arbitration

Pursuant to 28 U.S.C.A. § 1782(a), US federal district courts may order discovery for use in a proceeding in a 'foreign or international tribunal'.[12] Four statutory requirements must be met for a court to grant such discovery:

> *(1) the request must be made 'by a foreign or international tribunal', or by 'any interested person'; (2) the request must seek evidence, whether it be the '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.*[13]

In recent years, Section 1782 applications had become the subject of academic interest and were increasingly being used by parties to obtain documents in connection with arbitration proceedings located outside of the United States. On 13 June 2022, in the consolidated cases of *ZF Automotive US, Inc, et al. v. Luxshare, Ltd* and *AlixPartners, LLP, et al. v. The Fund for Protection of Investors' Rights in Foreign States*, the Supreme Court addressed a circuit court split on a hotly debated issue of US arbitration law: whether parties in international arbitrations seated outside the United States may apply for assistance from domestic courts, under 28 U.S.C.A. § 1782(a), to obtain documentary discovery for use in the arbitrations. The Supreme Court held unanimously that private arbitration proceedings seated outside the United States do not fall within the scope of the statute because they are not 'foreign or international tribunal[s]' imbued with governmental authority by one or multiple nations.[14]

The *ZF Automotive* case involved a Hong Kong party's attempt to obtain US discovery from a Michigan-based automotive parts manufacturer and subsidiary of a German corporation, and its officers, for use in a post-M&A commercial arbitration seated in Germany and administered by the German Arbitration Institute. *AlixPartners* involved a Russian party's request for US discovery from a New York-based consulting firm and its chief executive officer, who was appointed as a temporary administrator of an insolvent and nationalised Lithuanian bank, in aid of an investor–state arbitration the Russian corporation had initiated against Lithuania under a bilateral investment treaty (BIT) between Russia and Lithuania. The *AlixPartners* tribunal was constituted in accordance with the UNCITRAL Arbitration Rules as provided in the Russia–Lithuania BIT. By consolidating both cases, the Supreme Court addressed the applicability of the statute to both international commercial arbitration and investor–state arbitration.

Holding that 'only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under [Section] 1782', the Supreme Court found that neither the commercial arbitration tribunal in *ZF Automotive* nor the ad hoc arbitration tribunal in *AlixPartners* met that standard because neither of them exercised 'governmental

12 28 U.S.C.A. § 1782(a) ('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 . . . ').

13 *Consorcio Ecuatoriano de Telecomunicaciones SA v. JAS Forwarding (USA), Inc*, 747 F.3d 1262, 1269 (11th Cir 2014).

14 *ZF Auto US, Inc v. Luxshare, Ltd*, 142 S. Ct. 2078, 2091 (2022).

authority conferred by one nation or multiple nations'.[15] While the Court conceded that the word 'tribunal' is broad and could encompass a private adjudicative body, the Court reasoned that the term "foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation, rather than to 'a tribunal that is simply located in a foreign nation'.[16] The Court similarly reasoned that a tribunal is 'international' 'when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes'.[17] The Court relied on the statute's history and the practical mismatch between the broad discovery afforded by Section 1782 with the more narrow discovery available in domestic arbitrations under the FAA.[18] The *ZF Automotive* decision resolved a long-standing circuit split that stemmed from the 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.[19] In *Intel*, the Court noted that, in 1964, Congress had replaced the phrase 'in any judicial proceeding pending in any court in a foreign country' in the statute with 'in a proceeding in a foreign or international tribunal'. The Court approvingly quoted 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"'.[20]

Since *Intel*, courts had split on whether Section 1782 permits discovery in aid of a foreign arbitration. The Fourth and Sixth Circuits have given a broad interpretation to the term 'tribunal' and allowed discovery in aid of purely private commercial arbitrations located abroad, while the Second, Fifth and Seventh Circuits had denied such discovery on the basis that Section 1782 is applicable only in aid of a 'tribunal' such as a court or quasi-judicial body of foreign states. Some circuits, such as the Second Circuit, had reasoned that tribunals in investor–state arbitration qualified as a 'foreign tribunal' under the statute.[21]

While the Supreme Court's decision in *ZF Automotive* seemingly put an end to the use of Section 1782 in aid of commercial arbitrations seated outside of the United States, the Court declined to adopt a bright-line rule for investor–state arbitrations or public international law arbitrations more generally. Indeed, the Court expressly stated that its finding regarding the ad hoc tribunal in *AlixPartners* did not 'foreclose[] the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority'.[22] Some commentators have interpreted this

15 id. at 2089–2091.

16 id. at 2086.

17 id. at 2087.

18 id. at 2088. The Court relied on the observation of the *Seventh Circuit in Servotronics, Inc v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020) that it was difficult to understand why parties to private arbitrations abroad would have broad access to federal court discovery assistance in the United States while parties to domestic arbitrations would be denied such assistance under the FAA. *ZF Auto US, Inc v. Luxshare, Ltd*, 142 S. Ct. at 2088–2089.

19 *Intel Corp v. Advanced Micro Devices, Inc*, 542 U.S. 241 (2004).

20 id. at 248–249.

21 For example, the Second Circuit allowed discovery in aid of the ad hoc arbitration panel in *AlixPartners*, holding that 'this arbitration is between an investor and a foreign State party to a bilateral investment treaty (here, the Treaty), taking place before an arbitral panel established by that Treaty, and therefore it is a "proceeding in a foreign or international tribunal" under § 1782.' *Fund for Prot of Inv Rts in Foreign States v. AlixPartners, LLP*, 5 F.4th 216, 225 (2d Cir. 2021).

22 *ZF Auto US, Inc*, 142 S. Ct. at 2091.

statement as leaving open the possibility that other 'tribunals' constituted in investor–state arbitrations, such as International Centre for Settlement of Investment Disputes (ICSID) tribunals, could qualify as a governmental or intergovernmental body under Section 1782.[23]

Morgan v. Sundance and the 'pro-arbitration policy' applied by US courts

In *Morgan v. Sundance*, the Supreme Court considered the circumstances in which a party waives a right to arbitrate by participating in a litigation. Although the case at issue involved US parties and US litigation, the Court's analysis is equally relevant to international arbitrations seated in the United States. The defendant in *Morgan v. Sundance* was a franchise owner who participated in litigation with a former employee for eight months, during which the employer argued that the case should be dismissed because it was duplicative of a similar, earlier-filed case. It was only after these eight months had lapsed that the employer sought to have the case referred to arbitration. Applying Eighth Circuit precedent, the district court found that the employer had waived its right to compel arbitration.[24] In doing so, the district court considered whether the employee had established prejudice, which is not a required element of federal waiver law and had been adopted exceptionally by the Eighth Circuit in the context of enforcing arbitration agreements because of the 'federal policy favoring arbitration'.[25] On appeal, the Eighth Circuit disagreed with the district court, finding that the employer had not prejudiced the employee by engaging in the litigation, because the parties had not yet formally begun discovery.[26]

The Supreme Court granted certiorari to resolve a circuit split over the question whether courts may 'invoke[] "the strong federal policy favoring arbitration" in support of an arbitration-specific waiver rule demanding a showing of prejudice'.[27] On 23 May 2022, the Supreme Court unanimously vacated the judgment of the Eighth Circuit and remanded the case. Noting that federal waiver law did not generally include the Eighth Circuit's third prong of the waiver test, the Supreme Court held that 'the FAA's "policy favoring arbitration" does not authorise federal courts to invent special, arbitration-preferring procedural rules', such as the Eighth Circuit's prejudice requirement.[28]

While *Morgan v. Sundance* could be misinterpreted as evidence that the Supreme Court may be retreating from its historically arbitration-friendly stance, this is not the case in the authors' view. Rather, the Supreme Court's decision in *Morgan v. Sundance* merely underscores a point that the Supreme Court has made before – namely, that arbitration

23 See, e.g., Linda Silberman, 'Discovery, Arbitration, and 28 USC §1782', in *Essays in International Litigation for Lord Collins* (Jonathan Harris and Campbell McLachlan ed., 2022). But see *In re Alpene, Ltd.*, 2022 WL 15497008 at *4 (E.D.N.Y. Oct. 27, 2022) (holding that an ICSID tribunal constituted under a BIT between China and Malta does not qualify as a 'foreign or international tribunal'); *In re Webuild SPA*, 2022 WL 17807321 at *3 (S.D.N.Y. Dec. 19, 2022) (holding same for an ICSID tribunal constituted under a BIT between Panama and Italy).

24 See *Morgan v. Sundance, Inc*, 2019 WL 5089205 at *8 (S.D. Iowa June 28, 2019).

25 See *Erdman Co v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1120 n.4 (8th Cir. 2011) (explaining that '[w]e can trace the origins of our prejudice requirement to *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir.1968)').

26 *Morgan v. Sundance, Inc*, 992 F.3d 711, 715 (8th Cir. 2021).

27 *Morgan v. Sundance, Inc*, 142 S. Ct. 1708, 1712 (2022).

28 id. at 1713.

agreements should be put on equal footing with other commercial contracts, and that the FAA's policy favouring arbitration 'make[s] "arbitration agreements as enforceable as other contracts, but not more so"'.[29]

Recognition and enforcement of foreign arbitral awards

US courts continued over the past year to address issues surrounding the recognition and enforcement of foreign arbitral awards.

Cases relating to the application of the European Court of Justice's Achmea and Komstroy decisions

In addition to several interesting circuit court decisions addressing enforcement issues under the FAA, as well as the New York and Panama Conventions, US courts continued to consider the effects of the 2018 and 2021 decisions of the European Court of Justice (ECJ) in *Slovak Republic v. Achmea BV*[30] and *Moldova v. Komstroy*[31] on the enforcement in the United States of arbitral awards arising from intra-European investor–state disputes.

As has been widely reported, *Achmea* and *Komstroy* made the enforcement of awards arising from arbitrations of investment disputes between EU nationals and EU Member States before courts of EU Member States impossible as a matter of EU law. Award creditors in intra-EU BIT arbitrations have therefore turned to US courts to seek enforcement of investor–state arbitration awards under these treaties. While recent decisions such as *InfraRed Env't Infrastructure GP Ltd v. Kingdom of Spain* appear to reflect a building consensus in US courts that *Achmea*-related enforcement proceedings should be stayed while proceedings in Europe are pending,[32] US courts have not addressed such enforcement actions in a uniform manner. On 29 March 2023, a US district court for the first time refused to enforce an Energy Charter Treaty award '[b]ecause Spain's standing offer to arbitrate was void as to the [Dutch investors] under [EU] law'.[33] The US District Court for the District of Columbia held in *Blasket* that, because no valid arbitration agreement existed, it could not establish jurisdiction pursuant to the arbitration exception to the Foreign Sovereign Immunities Act (FSIA).[34] The decision in *Blasket* is interesting not only because the district judge gave deference to the ECJ's decision in *Komstroy* but also because it involved the recurring issue of whether US courts should instead give deference to the arbitral tribunal's determination that a valid arbitration agreement existed. The Court disagreed with two recent rulings by other judges in the same district in cases against Spain – *9Ren Holdings* and *Nextera* – which found that because Spain contested the arbitrability of the dispute and not the existence of the underlying arbitration agreement, the ECJ's decision in *Komstroy* could not deprive US courts of jurisdiction under the arbitration exception to the FSIA.[35] All three decisions – *Blasket*, *9Ren* and *Nextera* – have been appealed to the DC Circuit.

29 id.

30 *Slovak Republic v. Achmea BV*, Case No. C-284/16 (6 Mar. 2018).

31 *Republic of Moldova v. Komstroy*, Case No. C-741/19 (2 Sept. 2021).

32 See, e.g., *InfraRed Env't Infrastructure GP Ltd v. Kingdom of Spain*, 2021 WL 2665406 (DDC 29 June 2021).

33 *Blasket Renewable Invs, LLC v. Kingdom of Spain*, 2023 WL 2682013, at *1 (D.D.C. Mar. 29, 2023).

34 id.

35 *9REN Holding SÀRL v. Kingdom of Spain*, 2023 WL 2016933, at *5-6 (D.D.C. Feb. 15, 2023) (holding that '[t]he assertion that a party lacked a legal basis to enter or invoke an arbitration agreement is not a

Cases addressing various enforcement issues under the FAA and the New York and Panama Conventions

US courts have also issued several recent decisions interpreting the FAA and the New York Convention that are significant for international arbitration law in the United States. In *Esso Exploration*, the Second Circuit upheld the district court's refusal to enforce an award issued by a Nigeria seated arbitral tribunal by extending comity to the judgments of the Nigerian courts, which partially set aside the award.[36] The Court reiterated its ruling in *Pemex*[37] that in applying Article V(1)(e) of the New York Convention, a district court should enforce an award that was set aside by a court in the jurisdiction of the arbitral seat only if that court's judgment was 'repugnant to fundamental notions of what is decent and just', a standard that is 'high, and infrequently met'.[38] The Court clarified that *Pemex* should not be misunderstood to reduce the applicable standard to a four-factor test that courts must apply in every case. Emphasising that its role was not to second-guess the Nigerian Court of Appeal's findings made under Nigerian law, the Court distinguished the *Pemex* case, noting that 'in contrast to the egregious retroactive application of new laws that occurred in *Pemex*', the Nigerian Court of Appeal relied on Nigerian laws 'enacted either before the parties began their contractual relationship or before this dispute arose'.[39]

The Eleventh Circuit likewise addressed the public policy exception to the enforcement of foreign arbitral awards. In *Tĕcnicas Reunidas de Talara SAC*, the Eleventh Circuit held that the Panama Convention's public policy defence – which the Court explained was substantially the same as the New York Convention's public policy defence – is 'narrow and rarely successful' and can be waived 'either [by] express consent or a failure to raise an objection in a clear and timely manner'.[40] The question presented was whether Técnicas could resist enforcement of the award because of the side-switching of two of its attorneys, who withdrew their representation and joined the opposing party's law firm during the arbitral proceedings. The Eleventh Circuit refused to express an opinion on whether such behaviour violated US public policy, finding that, even if it did, Técnicas waived such public policy defence by failing to raise an objection until the enforcement stage, even though it knew about the side-switching and could have objected during the arbitral proceedings. This decision reinforces the notion that US courts will apply the exceptions to the enforcement of foreign arbitral awards strictly – in particular, where it appears that the moving party did not raise a similar objection before the enforcement stage.

Equally noteworthy are two circuit court decisions that considered how courts should address the question whether a valid arbitration agreement exists. First, in *Jiangsu Beier Decoration Materials Co v. Angle World LLC*, the Third Circuit vacated a district court's order dismissing the petition of a China-based manufacturer to enforce an arbitration award against a Pennsylvania-based distributor on the basis that the Chinese applicant had failed

challenge to the jurisdictional fact of that agreement's existence but rather a challenge to that agreement's arbitrability'); *Nextera Energy Glob Holdings BV v. Kingdom of Spain*, *Nextera Energy Glob Holdings BV v. Kingdom of Spain*, 2023 WL 2016932, at *6-7 (D.D.C. Feb. 15, 2023) (same).

36 *Esso Expl & Prod Nigeria Ltd v. Nigerian Nat'l Petroleum Corp*, 40 F.4th 56 (2d Cir. 2022).

37 *Corporacion Mexicana De Mantenimiento Integral, S De RL De CV v. Pemex-Exploracion Y Produccion*, 832 F.3d 92, 97 (2d Cir. 2016).

38 *Esso Expl & Prod Nigeria Ltd*, 40 F.4th at 73–74 (quoting *Pemex*).

39 id. at 75.

40 *Técnicas Reunidas de Talara SAC v. SSK Ingenieria y Construccion SAC*, 40 F.4th 1339, 1344-45 (11th Cir. 2022).

to prove that there was a valid arbitration agreement. The Third Circuit concluded that issues of fact existed on the issue of whether the parties had entered into a valid agreement to arbitrate through their exchange of emails, and that this precluded dismissal of the manufacturer's petition.[41] Noting that the New York Convention does not define the phrase 'exchange of letters', the Court found that such an exchange 'must at minimum demonstrate an "agreement" between the parties, that is, a manifestation of mutual assent to be bound by a contract containing an arbitration clause'.[42]

Second, in *Reddy v. Buttar*, the defendant had argued that because the FAA confers subject matter jurisdiction for actions 'falling under the Convention', parties relying on this jurisdictional grant must satisfy the New York Convention's requirements, including the requirement that there be a written arbitration agreement. The Fourth Circuit disagreed, finding that the Eleventh Circuit's analysis in *Czarina*[43] – on which the defendant relied – 'blurs the distinction between jurisdictional and merits requirements'.[44] Following the reasoning of the Second and Ninth Circuits, the Fourth Circuit held that the requirement of a written arbitration agreement was a merits issue that did not affect the question of the district court's subject matter jurisdiction under the statute.

Statutory and 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, or refuse to recognise, an arbitral award. As reflected in recent court decisions, the intent of both the statute and the treaty is to ensure that courts will confirm and enforce arbitral awards except in very narrow circumstances.

Statutory grounds for vacatur of awards

The Eleventh Circuit Court of Appeals, sitting *en banc*, recently addressed the question whether the grounds to set aside an international arbitration award made in the United States and subject to the New York Convention are those set out in Article V of the Convention or in Chapter 1 of the FAA (which governs domestic arbitration).[45] In a decision issued on 13 April 2023, the Eleventh Circuit in *Corporación AIC, SA v. Hidroeléctrica Santa Rita SA* held that where an international arbitration is seated in the United States, or where US law governs the conduct of the arbitration, the resulting (non-domestic) award is subject to the vacatur grounds set out in domestic law (i.e., Section 1 of the FAA).[46] The case involved two Guatemalan companies involved in an arbitration seated in Miami. The award debtor brought suit in federal court seeking to vacate the award on a ground set out in Chapter 1 of the FAA (the tribunal exceeded its powers) that is not reflected in Article V of the Convention. The district court found that that ground was not available as a basis for vacatur because Article V of the Convention sets out the exclusive grounds for vacatur for an award governed by the Convention. Overruling prior Eleventh Circuit precedent, the Eleventh Circuit, *en banc*, reversed and concluded that Chapter 1 of the FAA provides the grounds for vacatur of a non-domestic New York Convention award in an arbitration seated in the United States,

41 *Jiangsu Beier Decoration Materials Co v. Angle World LLC*, 52 F.4th 554 (3d Cir. 2022).

42 id. at 561.

43 *Czarina, LLC v. WF Poe Syndicate*, 358 F.3d 1286, 1292 (11th Cir. 2004).

44 *Reddy v. Buttar*, 38 F.4th 393 (4th Cir. 2022).

45 *Corporacion AIC, SA v. Hidroelectrica Santa Rita SA*, 66 F.4th 876 (11th Cir. 2023).

46 id. at 890.

not Article V of the Convention, because Section 208 of the FAA calls for the application of domestic law for those matters not governed by Section 2, such as the grounds for vacating an arbitral award.

Non-statutory grounds for vacatur of awards

As reported in prior editions of this publication, a judicially created doctrine known as 'manifest disregard of the law' has developed in the United States over the past seven decades as a non-statutory ground for vacatur of arbitral awards made in the United States. This doctrine has sometimes allowed parties to seek an expanded review of the merits of arbitrators' decisions, at least in theory. Successful invocation of the doctrine is exceedingly rare, however, and appellate decisions in the past few years have brought even the existence of the doctrine into question after the Supreme Court cast doubt on the validity of the manifest disregard ground for vacatur in the *Hall Street* case, noting that it may have been a shorthand for grounds already present in the FAA.[47]

While the Court's criticism of manifest disregard in *Hall Street* is itself merely dicta, the Court was clearly sceptical about a merits-based review that threatened to turn arbitration into a mere prelude to a 'more cumbersome and time-consuming judicial review process'.[48] It has declined, however, to use opportunities in later decisions to state explicitly whether the manifest disregard doctrine survived *Hall Street*.[49]

As a result of the Supreme Court's lack of clear direction, a circuit split has arisen over the continuing validity of the manifest disregard doctrine post-*Hall Street*. The Fifth, Eighth and Eleventh Circuits have interpreted *Hall Street* as an express rejection of the manifest disregard doctrine.[50] The Second and Ninth Circuits, meanwhile, have held that manifest disregard is a judicial gloss on the FAA's statutory grounds for vacatur and have continued to apply their manifest disregard jurisprudence.[51] Both Circuits have found that a high standard must be met for the doctrine to apply.[52] The Fourth Circuit has ruled that the manifest disregard doctrine is still viable,[53] while the Seventh Circuit has stated that 'manifest disregard of the law is not a ground on which a court may reject an arbitrator's award unless it orders parties to do something that they could not otherwise do legally (e.g., form a cartel to fix

47 *Hall Street Assocs, LLC v. Mattel, Inc*, 552 U.S. 576, 585 (2008).

48 id. at 588 (quoting *Kyocera Corp v. Prudential-Bache Trade Servs, Inc*, 341 F3d 987, 998 (9th Cir. 2003)).

49 See *Stolt-Nielsen SA*, 559 U.S. 662, 672 n.3; see also Gary B Born, *International Commercial Arbitration* 3634–3635 (3d ed. 2021) (discussing the relationship between *Stolt-Nielson SA* and *Hall Street* on the manifest disregard doctrine under the FAA).

50 See *Citigroup Global Mkts, Inc v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009); *AIG Baker Sterling Heights, LLC v. Am Multi-Cinema, Inc*, 579 F.3d 1268, 1271 (11th Cir. 2009); *Med Shoppe Int'l, Inc v. Turner Invs, Inc*, 614 F.3d 485, 489 (8th Cir. 2010).

51 See *Stolt-Nielsen SA*, 548 F.3d 85, 94-95; *Comedy Club, Inc v. Improv West Assocs*, 553 F.3d 1277, 1290 (9th Cir. 2009).

52 See *Biller v. Toyota Motor Corp*, 668 F.3d 655, 667 (9th Cir. 2012); *Goldman Sachs Execution & Clearing, LP v. Official Unsecured Creditors' Comm of Bayou Group, LLC*, 491 Fed.Appx. 201, 204 (2d Cir. 2012).

53 *Wachovia Sec, LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012); *Warfield v. Icon Advisers, Inc*, 26 F.4th 666, 669 n3 (4th Cir 2022) (refusing to revisit its previous ruling that the manifest disregard doctrine remains viable after *Hall Street*, while also acknowledging the circuit split in passing and noting that '[a]t some point, the Supreme Court or Congress will have to resolve the issue').

prices)'.[54] 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'.[55]

Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence.[56] Regardless of the different approaches to the doctrine in various circuits, even if the doctrine maintains any force at all, it 'provides very little, if any, basis for annulment beyond that provided by the FAA's "excess of authority" provision (in §10(a)(4) of the FAA)'.[57]

Arbitrability

Unlike the UNCITRAL Model Law and many national arbitration statutes around the world, the FAA does not affirmatively grant arbitrators the authority to decide whether parties have agreed to arbitrate a particular dispute (often referred to as the issue of 'arbitrability' under US law).[58] Under a long line of cases, including *Granite Rock Co v. International Brotherhood of Teamsters*,[59] arbitrability in the United States is typically an issue for judicial determination. However, under the Supreme Court's decision in *First Options of Chicago, Inc v. Kaplan*, if the parties have 'clear[ly] and unmistakab[ly]' referred the question of arbitrability to the arbitrators, then arbitrability issues are for the arbitrator to decide in the first instance, not the courts.[60] Ordinary state contract law principles apply to the issue of whether the referral of the issue to the arbitrators was clear and unmistakeable.[61]

One issue that arises with regularity and has significant practical importance is whether an arbitration agreement's incorporation of the rules of an arbitral institution that expressly authorise the arbitrator to resolve the question of arbitrability qualifies as 'clear and

54 *Johnson Controls, Inc v. Edman Controls, Inc*, 712 F.3d 1021, 1026 (7th Cir. 2013) (citation omitted).

55 *Physicians Ins Capital v. Praesidium Alliance Grp*, 562 Fed.Appx. 421, 423 (6th Cir. 2014) (citation omitted).

56 For the First Circuit, compare *Ramos-Santiago v. United Parcel Servs*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) ('[M]anifest disregard of the law is not a valid ground for vacating or modifying an arbitral award . . . under the [FAA]'), with *Kashner Davidson Sec Corp v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010) ('[We] have not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*.'); see also *Paul Green Sch of Rock Music Franchising, LLC v. Smith*, 389 Fed.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 Fed.Appx. 186, 197 (10th Cir. 2009) (finding no need to decide whether manifest disregard survives *Hall Street* because petitioners have not demonstrated it); *Selden v. Airbnb, Inc*, 4 F.4th 148, 160 n.6 (D.C. Cir. 2021) (avoiding the issue by finding that the party seeking to vacate an award had failed to establish that the arbitrators disregarded the law).

57 Gary B Born, *International Commercial Arbitration* 3634–3643 (3d ed. 2021).

58 In most of the world, 'arbitrability' is narrowly understood as a term that relates to whether a particular subject matter is legally capable of being settled through arbitration. In the United States, however, courts have used 'arbitrability' in a much broader sense, to encompass those instances where a matter cannot be referred to arbitration for any reason, including where there is no valid arbitration agreement, or the statute of limitations has lapsed. See George A Bermann, *Arbitrability Trouble*, 23 Am. R. Int'l Arb. 367 (2012).

59 *Granite Rock Co v. Int'l Broth of Teamsters*, 561 U.S. 287 (2010).

60 *Henry Schein, Inc v. Archer & White Sales, Inc*, 139 S.Ct. 524, 530 (2019) (quoting *First Options of Chicago, Inc v. Kaplan*, 514 U.S. 938, 944 (1995)). For a thorough discussion of this issue, see Gary B Born, *International Commercial Arbitration* 1217–1287 (3d ed. 2021).

61 *First Options*, 514 U.S. 938, at 944.

unmistakeable' intent. The Second Circuit and District of Columbia Circuit have reached different conclusions as to whether the incorporation of institutional rules necessarily amounts to 'clear and unmistakeable' evidence when an arbitration agreement is limited in scope.[62]

On 15 September 2022, in *LAVVAN*, the Second Circuit reaffirmed its ruling in *DDK Hotels* that the incorporation of institutional Arbitration Rules may, but does not necessarily, provide 'clear and unmistakable evidence' of an intent to delegate the issue of arbitrability to the arbitral tribunal. [63] The Second Circuit upheld the district court's finding that because the parties' agreement allowed certain types of disputes to be litigated, the agreement did not express a broad intent to arbitrate 'all aspects of the disputes'.[64] The Second Circuit explicitly rejected the defendant's claim that incorporating the International Chamber of Commerce (ICC) Rules into the parties' arbitration agreement provided 'clear and unmistakable evidence' of an intent to delegate arbitrability to the arbitral tribunal, finding that the ICC Rules were incorporated only into the first subsection of the parties' dispute resolution clause but not into the second subsection, which excluded intellectual property disputes from arbitration. Therefore, in the Second Circuit, if an arbitration agreement is narrow in scope or limited to only a subset of disputes, the incorporation of institutional rules that delegate issues of arbitrability to the arbitrators will not constitute 'clear and unmistakable' evidence that the parties wished to arbitrate the issue of arbitrability.

On the other hand, courts in the Second Circuit will continue to view the incorporation of institutional rules that delegate the issues of arbitrability to the arbitrators as such 'clear and unmistakable' evidence to the extent that the arbitration agreement is broadly drafted.[65]

ii Investor–state arbitration developments

The North American Free Trade Agreement (NAFTA) among Canada, Mexico and the United States came into force in 1994. Under NAFTA's investment protection chapter, over 76 claims have been filed by investors from these three jurisdictions. On 1 July 2020, NAFTA was replaced with the Agreement between the United States of America, the United Mexican States and Canada (USMCA). Although the USMCA contains protections for investors from contracting states, there are several key distinctions. First, Canada did not sign the investor–state dispute settlement mechanism under USMCA. Therefore, US parties and investors may no longer bring arbitration claims under the treaty against Canada. Second, USMCA is narrower in the type of protections it affords foreign investors, notably by restricting an investor's ability to assert a claim of indirect expropriation against the host state.

Given these potentially material changes in the investor protection afforded by USMCA, Annex 14-C to USMCA provides for a sunset period of three years, due to expire on 30 June 2023, for investors with legacy investments (i.e., investments made prior to 30 June 2020) to bring claims under NAFTA. Recently, several claims have been brought

62 See *DDK Hotels, LLC v. Williams-Sonoma, Inc*, 6 F.4th 308, 318 (2d Cir. 2021); *Commc'ns Workers of Am v. AT&T Inc*, 6 F.4th 1344, 1349 (D.C. Cir. 2021).

63 *LAVVAN, Inc v. Amyris, Inc*, 2022 WL 4241192 (2d Cir. Sept. 15, 2022), abrogated in part by *Loc Union 97, Int'l Bhd of Elec Workers, AFL-CIO v. Niagara Mohawk Power Corp*, 2023 WL 3214508 (2d Cir. May 3, 2023).

64 id. at * 2.

65 See, e.g., *Citigroup Inc v. Sayeg Seade*, 2022 WL 179203 at * 7 (S.D.N.Y. Jan. 20, 2022) (quoting *DDK Hotels, LLC*, 6 F.4th at 319).

or notified against the United States by Canadian investors,[66] and several mega-claims have been brought by US investors against Canada.[67] These investors have invoked the legacy NAFTA mechanism.

iii Restatement of the US Law of International Commercial and Investor-State Arbitration

After more than a decade, the American Law Institute finally published, in March 2023, the Restatement of the US Law of International Commercial and Investor-State Arbitration.[68] The publication restates the US law of international commercial and investor–state arbitration and is an academic publication of great significance that will provide a comprehensive guide to understanding US case law on these subjects in the future.

III OUTLOOK AND CONCLUSIONS

As this overview makes clear, US courts continue to support international arbitration by providing a stable and effective framework for US seated arbitrations as well as for the recognition and enforcement of foreign arbitral awards in the United States. For this reason, US venues continue to be well regarded as seats for international arbitration when parties are negotiating international commercial transactions. The above developments reinforce the point that US courts remain sophisticated, restrained and generally arbitration-friendly when approaching matters that relate to arbitration law.

66 See *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/21/63, Request for Arbitration, Nov. 22, 2021; *Alberta Petroleum Marketing Commission v. United States of America*, Notice of Intent to Submit a Claim to Arbitration, Feb. 9, 2022.

67 See, e.g., *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5, Request for Arbitration, Feb. 17, 2023; *Westmoreland Coal Company v. Canada*, ICSID Case No. UNCT/23/2, Registered Apr. 5, 2023.

68 Restatement of International Commercial and Investor-State Arbitration (Am. L. Inst. 2023).