2019 In Review: Noteworthy Developments in the United States

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Giorgio Sassine (Assistant Editor for Canada and the United States) (Severson & Werson) and Kiran Nasir Gore (Associate Editor) (The George Washington University Law School; Law Offices of Charles H. Camp)

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2019 was an important year for international arbitration developments in the United States, both in the commercial and investment context. Some of the more far-reaching developments included the deepening circuit court split on whether "manifest disregard" of the law is a grounds to refuse enforcement of an award, the first U.S. Court of Appeals decision post-*Intel*, addressing whether an international arbitration tribunal is a "foreign or international tribunal" within the framework of 28 U.S.C. Section 1782, and jurisprudence and thought leadership events on the topic of corruption. We also witnessed (and continue to witness in 2020) the effect of the United States' "America First" policy.

As we move into the next decade, 2020 promises to be another exciting year for international arbitration developments in the United States. This year, the U.S. Supreme Court has already heard oral arguments regarding whether a non-signatory to an arbitration agreement can compel arbitration. Moreover, we look forward to seeing what may develop with the framework for Section 1782 discovery, following the Sixth Circuit's recent holding. We are also entering an election year in the United States, which may have implications for domestic politics and foreign affairs. Each of these topics is discussed in more detail below.

1. **Key Developments Relating to the New York Convention and Arbitrability**

2019 saw several key developments concerning the New York Convention, as codified in the U.S. by the Federal Arbitration Act (***FAA***), and also the broader concept of arbitrability.

A. Interpretation and Application of the New York Convention vis-a-vis the Federal Arbitration Act

The writing requirement pursuant to Article II(2) of the New York Convention in the context of non-signatories was considered by the Eleventh Circuit in *Outokumpu Stainless USA, LLC, et al. v. GE Energy Power Conversion France SAS, Corp.* As explained by our contributor, Outokumpu entered into supply contracts for mill motors that appended a subcontractor list with mandatory suppliers, one of which was GE. Each supply contract contained an arbitration agreement. When the motors failed, Outokumpu commenced suit against GE and GE sought to compel arbitration. The Court held that "there was no arbitration agreement in writing within the meaning of the Convention between Outokumpu and GE," reasoning that "private parties … cannot contract around the Convention's requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration."

Oral argument was heard by the U.S. Supreme Court on January 21, 2020 and the core issue under consideration is whether the New York Convention "permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel." We can anticipate a decision on this question within the next few months.

The concept of "manifest disregard" of the law as a grounds for refusing enforcement of an international arbitration was considered by the Second Circuit in *Weiss v. Sallie Mae, Inc*. As explained by our contributors, the Second Circuit accepted the manifest disregard of the law argument as a valid basis for challenging awards. This further cements a circuit split within the U.S., where certain Circuit Courts, including the Eleventh Circuit, will not accept "manifest

disregard" of the law as a valid basis for vacating an arbitral award because it is not expressly provided as a ground under the FAA. This issue continues to ripen and we can expect that it will, in the coming years, be considered and clarified by the U.S. Supreme Court. This will be a welcome development, as the U.S. Supreme Court has not considered the matter since 2008, when in *Hall Street Assocs., LLC v. Mattel, Inc.* as summarized by our contributors, the Supreme Court "ruled that the only bases for vacating an arbitral award are the ones expressly stated in the FAA, which does not included manifest disregard, but declined to rule that manifest disregard was dead."

B. Arbitrability

During 2019, the U.S. Supreme Court considered key principles of international arbitration in *Schein, Inc. v. Archer & White Sales, Inc*. The holding in *Schein* maintains that "courts must respect the terms of the arbitration agreement as written and that, if the parties agreed, an arbitral tribunal has the power to decide questions of arbitrability." In summary, The Court maintained its holding in *First Options*, that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."

We also learned what can happen when state law is not drafted with arbitration mind, reinforcing the importance of choosing a respected arbitral seat. In *Stemcor USA, Inc.*, this dichotomy was front and center when a party attempted to use state law legal procedures to attach property to support an arbitration award. *Stemcor USA, Inc.* involved breaches of multiple contracts due to failures to deliver pig iron. As a result, Daewoo International Corp. filed an action in Louisiana federal district court to compel arbitration and sought writs of attachment.

While arbitration is often touted as an efficient and quicker way to resolve a dispute, the writ of attachments spawned litigation that ran on for years, as a result of jurisdictional issues, appeals, and the Fifth Circuit certifying the question to the Louisiana Supreme Court. "Finally, more than six years after getting the attachment, and with three District Court Decisions, three Fifth Circuit decisions, and a Louisiana Supreme Court decision, Daewoo got to hold onto its pig iron proceeds."

2. **Advancements in the Global Discovery Debate**

Perhaps the greatest headline-making development during 2019 involved 28 U.S.C. Section 1782, the statutory provision which permits a U.S. district court to order testimony or produce documents in aid of a proceeding before a "foreign or international tribunal." Several of our contributors covered new developments, which highlight the deepening circuit split over whether such discovery may be provided to aid a private international arbitration tribunal. During 2019, a New York federal district court judge allowed such discovery in aid of an LCIA arbitration, another New York federal district court judge declined such discovery in aid of a CIETAC arbitration, the federal district court in the District of Columbia denied a request for production of documents, while allowing a request for written answers by way of interrogatories (as discussed in the following section of this post), and the Sixth Circuit allowed discovery in aid of a DIFC-LCIA arbitration.

As 2019 developments alone create a more deeply entrenched debate, practitioners are working arduously to further relevant jurisprudence and its understanding. At the end of 2019, the first book considering Section 1782 discovery as an independent discipline was published. Meanwhile, early this year, the Second Circuit is expected to settle internal disparity among the district courts over which it has jurisdiction through the much awaited appellate decision in *In re Hanwei Guo*. Guidance of the U.S. Supreme Court is become increasingly welcome by U.S. practitioners. Meanwhile, as Section 1782 discovery continues to proliferate, practitioners cannot help but wonder how it might interact with more global views of disclosure and discovery, particularly in light of the French blocking statute and GDPR compliance.

3. **Allegations of Bribery and Corruption in Arbitration Proceedings**

Issues of corruption were addressed in U.S. international arbitration jurisprudence. In *Vantage Deep Water Co. v. Petrobras Am., Inc.*, a Texas federal district court denied Petrobras' motion to vacate Vantage Deepwater Drilling's arbitral award based on corruption of the underlying contract. Petrobras submitted that the award should be set-aside pursuant to the Inter-American Convention on International Commercial Arbitration. While Petrobras argued that the bribery violated U.S. public policy (one of the narrow exceptions to enforcing an arbitral

award under U.S. federal law), the Court "took the view that public policy did not refer to any international notion but rather should be examined with respect to Texas law. In this case, Petrobras continued with recognizing the agreement with the knowledge of the bribery allegations, and thus, ratified the agreement under Texas law." As explained by one of our contributors, the case is particularly "notable in that it squarely acknowledges that a state actor or state-owned entity should not use their own misconduct as a defense, particularly when they later ratified that conduct."

In re Application of The Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer, LLP demonstrated that various compelling and current issues can intersect in the context of any one case. The federal district court for the District of Columbia considered Pakistan's request for Section 1782 discovery from an investor's American counsel in aid of an ICSID arbitration and pending criminal investigations in Pakistan against the backdrop of corruption allegations. As explained by our contributor, the Court ultimately denied the request for production of documents, recognizing that the jurisdictional reach of the ICSID tribunal and Pakistani criminal authorities encompassed the scope of relevant materials and, moreover, that attorney-client privilege might undermine the substance of the request. However, Pakistan's request for written answers by way of interrogatories was granted.

Reflecting the arbitration community's increasing interest in bribery and corruption in arbitration proceedings, such allegations were also considered during the ILA American Branch Investment Law Committee's conference titled "*What to Do About Corruption Allegations? Debating the Options for Investment Law*" held on February 19, 2019 in Washington, D.C. The conference addressed the resolution of corruption allegations in international investment arbitration following the *Metal-Tech Ltd. v. Uzbekistan* and *Spentex Netherlands, B.V. v. Uzbekistan* awards. In the aftermath of those awards, the field of investment arbitration has grappled with questions regarding the proof of corruption and response to findings of corruption. Those awards combined flexible evidentiary techniques for assessing corruption allegations with the outright dismissal of the arbitration upon finding corruption. The conference addressed whether and to what degree investment arbitration should follow such approaches to addressing corruption.

4. **Domestic and Regional Developments – Carrying Global Significance**

Upon his return to the Blog, our General Editor, Prof. Roger Alford, highlighted *United States v. Novelis*, where the U.S. Department of Justice's Antitrust Division pursuant to the Administrative Dispute Resolution Act of 1996 (and the Antitrust Division's implementing regulations) "took a novel approach of using arbitration to challenge [a] merger" for the first time in U.S. history, which typically sues in federal court.

While foreign policy is not usually a focus of the Blog, its interaction with international disputes cannot be denied. During 2018 and 2019, we have seen a number of developments initiated by the U.S. "America First" protectionist approach to economic sanctions and we enter 2020 with a changed view of the landmark 2015 Joint Comprehensive Plan of Action (***JCPOA***) Iran nuclear deal. The U.S. walked away from the deal in 2018, and in response, Iran decreased its compliance efforts. This created a ripple effect in the world of extraterritoriality, conflict of laws, and secondary sanctions.

In recent weeks, global headlines were made when the E.U. partners of the JCPOA indicated their intent to invoke the deal's dispute resolution mechanism. On the private dispute resolution side, challenges concerning available claims and defenses may emerge as international actors encounter disputes related to their international activities. Our contributors directly considered the dilemma and practical concerns faced by international arbitrators. This is a new and emerging area of law to be closely watched by global practitioners.

Meanwhile, "NAFTA 2.0," the U.S.-Mexico-Canada Trade Agreement (USMCA), continued toward ratification and entry into force. As reported in our 2018 year in review post, this is a significant regional development as the USMCA's Chapter 14 departs from NAFTA's Chapter 11, both in terms of procedure and substance of protections available to prospective investors. As reported earlier on the Blog by assistant editor Enrique Jaramillo, the significant advancements made in recent weeks likely mean the USMCA will enter into force in May 2020. It is also likely time for practitioners to consider the timing of legacy claims under original NAFTA, before it is no longer in force, and its interaction with the USMCA as it enters into force and heralds a new era in regional investor-state dispute settlement.