2018 In Review: A View From the United States

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As we head into the new year, it is worth reflecting on major international arbitration-related developments in the United States during 2018 and their coverage on the blog.

Early in the year, our authors homed in on the U.S. Federal Arbitration Act (***FAA***), which embodies U.S. arbitration law, including the New York Convention. As one of our authors wrote, the FAA "is the oldest – but still functioning – arbitration statute in the world. Case law has rewritten much of its content, so that the statute's true content is buried in federal decisional law." These words might as well become a mantra for relevant developments:

- In January, the Ninth Circuit federal appellate court reviewed an arbitration agreement in a maritime insurance policy and considered whether it was "reverse preempted" by the McCarran-Ferguson Act. The Act permits states to "trump" otherwise applicable federal law, if (i) the state law regulates the business of insurance, (ii) the conflicting federal law does not, and (iii) the federal law would "invalidate, impair, or supersede" state insurance law. The Court enforced the arbitration agreement under the

FAA and concluded that the parties' sophistication confirmed their ability to agree to AAA arbitration for coverage disputes (original post here).

- In February, a New York state appellate court issued a decision that has curtailed "a procedural loophole in Chapter 2 of the Federal Arbitration Act." Our author explained that New York provides an alternate path toward enforcement of foreign arbitral awards: Under Article 53 of the New York Civil Practice Law, parties may first obtain a foreign court judgment recognizing the award, and then seek recognition of that judgment as a foreign money judgment. This approach allows enforcing parties to obtain recognition of a foreign money judgment even if the enforcing court lacks personal jurisdiction over the debtor party (which, in contrast, is required for enforcement under the FAA). The Court's decision limits the utility of this tactic and we will likely see its full impact over time (original post here).

- In March, a Texas federal district court considered whether, under the FAA, a consent award (entered into before a final hearing) is subject to confirmation. The respondent argued that the Court lacked jurisdiction because (i) the New York Convention is generally silent on the treatment of settlement awards and (ii) the issued award was not a reasoned award. The Court rejected both arguments, finding that the parties requested the award, commented on a draft of it, and that the award otherwise operated within the context of the arbitration (original post here).

- Finally, in May, in *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court held in a 5-4 majority that one-on-one mandatory employment arbitration agreements must be enforced as written. The Court held that, unless the arbitration agreement violates a party's basic contract rights (*e.g.*, it was procured through fraud or duress), the clear terms of the arbitration agreement prevail. Justice Ginsburg issued a thoughtful dissent which dissected the intent of the FAA's Section 1 (original post here).

Out West, California emerged as a true forum for arbitration. The Silicon Valley Arbitration & Mediation Center (SVAMC) is now a resource for the promotion of dispute resolution in the global technology sector. Its potential is fully unlocked by foreign attorneys' new-found ability to participate in international arbitrations conducted within the state (coverage here).

Of course we cannot ignore the elephant in our region: In 2017 President Trump announced his intent to renegotiate NAFTA, which has existed unchanged since 1994. As we waited patiently for concrete developments, our authors commented on the future of NAFTA, including the opportunity to strengthen ISDS' public policy perspective and post-Brexit scenarios where the UK might wish to join NAFTA (part 1 and part 2).

In October 2018, President Donald Trump delivered what many of us have dubbed NAFTA 2.0. But of course the treaty has a new name and a different approach to match. The dispute resolution procedures of the proposed U.S.-Mexico-Canada (USMCA) Trade Agreement depart from NAFTA's Chapter 11. Our authors explored their initial impressions, analyzed specific provisions, and discussed the possible effect on ISDS globally.

Even after the November 30th signing ceremony at the G-20 Summit in Buenos Aires, the USMCA is not yet the law of the land. Each country must now follow its domestic procedures for ratification, and in the U.S., this will mean Congressional approval.

President Trump tweeted on the same day as the signing ceremony that the USMCA represents "one of the most important, and largest, Trade Deals in U.S. and World History." I am inclined to agree with him. Once finalized it will account for more than $1.2 trillion in trade in one of the world's largest free trade zones.

During 2019 we are sure to see further developments in each of these areas.