10th
Anniversary
Edition

2016-2017

The Baker McKenzie **International Arbitration Yearbook**

United States

Edward “Teddy” Baldwin,[1] J.P. Duffy[2] and Brandon Caire[3]

A. Legislation and rules

A.1 Legislation

A.1.1 General legislation

The United States is a federal country with arbitration-related legislation existing at both the national (federal) and state levels. The Federal Arbitration Act (FAA) of 1925 continues to be the controlling federal statute regarding arbitration, and reflects a well-established national policy in favor of arbitration. There has been no federal legislation since 1990 substantively amending or altering the FAA. In general, the FAA has grown stronger over time and held to its original purpose of promoting a strong national policy in favor of arbitration.

At the state level, there are also arbitration laws in place, particularly in jurisdictions where commercial arbitration centers are located, that further encourage and promote arbitration as an acceptable mechanism for dispute resolution. Such jurisdictions include the states of California, Florida, Illinois, New York, and Texas. More states are attempting to follow this trend. For example, the New Jersey state

---

[1] Teddy Baldwin is a partner in Baker McKenzie’s Washington, D.C. office. Teddy focuses his practice on complex international and multijurisdictional arbitration. He has represented many foreign entities and multinational corporations in arbitrations under the Rules of the ICSID, ICC, ICDR, LCIA, HKIAC and other institutions, as well as *ad hoc* proceedings.
[2] J.P. Duffy is a partner in Baker McKenzie’s New York office. J.P. focuses his practice on international arbitration and related litigation and has represented clients across a range of industries in arbitrations conducted under the ICC, AAA/ICDR, LCIA, HKIAC, SIAC, DIAC, JAMS, GAFTA, ICSID and UNCITRAL rules in the United States, Europe, Asia, Africa, the Middle East and Latin America, as well as in *ad hoc* proceedings in a number of jurisdictions.
[3] Brandon Caire is a senior associate in Baker McKenzie’s Houston Dispute Resolution group, focusing primarily on energy, securities and pharmaceutical disputes. He has represented clients in arbitrations under the rules of the ICC, LCIA, CPR, and other institutions.

assembly is considering Assembly Bill 1138, titled the "New Jersey International Arbitration, Mediation, and Conciliation Act," which has been proposed to "encourage the use of arbitration, mediation, and conciliation to reduce disputes arising out of international business" in the state. The Virginia legislature passed House Bill 641, which creates general district courts' and circuit courts' concurrent jurisdiction to submit matters to arbitration and provides for the appeal of any decision compelling arbitration to the circuit courts.

A.1.2 Arbitration provisions in consumer, employment, and long-term health care agreements

While prevailing legislation favors arbitration, there are continuing efforts both at the federal level and in many US states to pass laws and regulations either prohibiting or limiting the effect of arbitration provisions in specific types of agreements — primarily consumer, employment, and long-term health care contracts. Although efforts have been underway since 2007, no federal legislation has yet been passed in this regard by either the U.S. House of Representatives or the U.S. Senate. Legislators have continuously introduced proposals in its wake, however, including most recently Senate Bill 2506, sponsored by Senator Pat Leahy of Vermont, which purports to amend the Federal Arbitration Act to invalidate certain consumer arbitration agreements. On the state level, attempts to prohibit or limit arbitration in the consumer, health care and employment contexts have been largely unsuccessful. Most notably, in 2015, California Governor Jerry Brown vetoed bill AB-465, which, if signed, would have prohibited employers from requiring employees to sign arbitration agreements absent certain narrow exceptions. Similar legislation remains under consideration in New York (A.B. 9956), Illinois (H.B. 4663), and Missouri (H.B. 156).

B. Cases

B.1 U.S. Appeals Court confirms arbitration award despite annulment at seat of arbitration

In *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex Exploración Y Producción*, No. 13-4022 (2d Cir. Aug. 2, 2016), the Second Circuit, which includes New York, affirmed an arbitration award that had been annulled by Mexican courts. The underlying dispute arose out of a contract to build oil platforms between Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. ("COMMISA"), a Mexican subsidiary of a US construction company, and Pemex-Exploración Y Producción ("PEP"), a subsidiary of Petroleos Mexicanos ("PEMEX"), Mexico's state-owned oil company. The contract called for ICC arbitration with Mexico City as the seat of the arbitration.

COMMISSA prevailed in the arbitration and obtained an award against PEP of USD 300 million. COMMISSA successfully confirmed the award in the New York courts. PEP brought challenges to the award in its home country, which was also the seat of the arbitration. PEP asserted that it had administratively rescinded the contract and therefore the dispute was not arbitrable. The Mexican courts agreed, held that the effect of PEP's rescission was not arbitrable and thus annulled the award. PEP challenged the confirmation of the award in the Second Circuit following the vacatur by the Mexican courts, resulting in a remand back to the district court to consider the effect of the vacatur decision. Upon remand, the district court again confirmed the award, holding that the annulment of the award violated basic notions of justice, among other reasons.

On appeal, the Second Circuit upheld the lower court's confirmation of the award. The Second Circuit held that a foreign court judgment is generally conclusive unless its enforcement would offend the public policy of the state where enforcement is sought. Noting that the public policy exception standard was "high, and infrequently met," the Court held that the Panama Convention affords a district court discretion to

enforce a foreign arbitral award annulled at the seat "only to vindicate fundamental notions of what is decent and just in the United States." The Second Circuit found that this high standard was met in this case.

B.2 United States Appeals Court requires production of documents held outside the United States by affiliates of subpoenaed party

"Section 1782" is a US statute that has long been used by arbitration parties to obtain discovery from companies located in the United States in connection with an arbitration proceeding. Typically, a 1782 action would only allow a party to obtain discovery of documents that were in the United States from companies located in the United States.

In the case of *Sergeeva v. Tripleton Int'l Ltd.*, No. 15-13008 & 15-15066, the Eleventh Circuit Court of Appeals broadened that understanding and held that discovery could be made of documents located abroad so long as the US company had the legal rights to obtain the documents abroad. The Eleventh Circuit examined the four *prima facie* requirements that must be met before a court can order discovery under Section 1782:

> (1) The request must be made "by a foreign or international tribunal"; (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.

Tripleton argued that it did not have to produce documents that were held by affiliate companies overseas. The Court disagreed, finding that Tripleton had control of responsive documents held by the affiliates overseas and therefore had to produce those documents. Section 1782 can be a powerful tool with which to obtain discovery in the course of an international arbitration. The Eleventh Circuit has

broadened that power by, in some circumstances, allowing the discovery of documents held by related companies.

B.3 U.S. Appeals Court enforces arbitration award against sovereign based on activity not considered commercial activity

Typically, US courts will not waive a state's sovereign immunity unless that state is engaged in commercial activity. The D.C. Circuit Court of Appeals highlighted an important caveat to that rule in *Diag Human v. Czech Rep. - Ministry of Health*, No. 14-7142, 2016 U.S. App. LEXIS 9770 (D.C. Cir. May 31, 2016).

Diag Human — a medical technology company — entered into an agreement with the Czech Ministry of Health to, among other things, provide training for medical personnel to ensure the proper transport of blood products. Diag Human was to receive a share of the total volume of fractionated plasma produced for this project. The Ministry of Health also worked with another company — Novo Nordisk — to distribute the plasma. Diag Human had a separate agreement with Novo Nordisk for other work. In a second tender, the Ministry of Health rejected Diag Human's bid and expressed concern about Diag Human's business ethics. This assertion by the Ministry of Health allegedly led Novo Nordisk to cancel its transaction with Diag Human as well. The parties agreed to resolve their dispute through arbitration. In 2008, the tribunal awarded Diag Human over USD 325 million in damages and interest. Diag Human sought to enforce its award in the United States District Court for the District of Columbia pursuant to the New York Convention.

The District Court dismissed the enforcement action for lack of subject matter jurisdiction, holding that the relationship between Diag Human and the Ministry of Health was not commercial and therefore no exception to the Foreign Sovereign Immunities Act (FSIA) applied. The District Court concluded that after the second tender, the Ministry of Health no longer engaged in commercial activity with Diag Human

and that the allegedly offending statement was not commercial activity.

On appeal, the D.C. Circuit Court reversed the lower court's decision and confirmed the award. The Circuit Court first laid out the application exception to sovereign immunity under the FSIA to this award:

> "*A foreign state shall not be immune from the jurisdiction of courts of the United States ... in any case ... in which the action is brought ... to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, ... if ... the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.*"

The Circuit Court held that the Czech Republic and Diag Human shared a legal relationship because, at the time of the events, the parties had been operating under an open-ended agreement. The court had no doubt that the agreement constituted a legal relationship because it imposed corresponding duties on each side that the parties continued to perform. The court further held that the relationship was governed by a treaty — the New York Convention — because the parties had agreed to international arbitration. The Court therefore found that this exception to the FSIA applied.

B.4 Personal jurisdiction needed to confirm award covered by the New York Convention

In two similar cases consolidated for argument by the Fifth Circuit, *First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd*., No. 12-30377, 2012 US App. LEXIS 26207 (5th Cir. Dec. 21, 2012) and *Covington Marine Corp. v. Xiamen Shipbuilding Indus. Co*., No. 12-30383, 2012

US App. LEXIS 26297 (5th Cir. Dec. 21, 2012), petitioners appealed denials of their petitions to confirm arbitration awards against respondents, the People's Republic of China (PRC) and Chinese corporations owned by the PRC (the "Corporate Respondents"). The district court's decisions in both cases were based on a lack of personal jurisdiction over the Corporate Respondents and a lack of subject matter jurisdiction over the PRC. The Fifth Circuit upheld the denial of the petitions for confirmation.

The Fifth Circuit held that foreign corporations are entitled to the protections of the Due Process Clause of the United States Constitution; thus, sufficient contacts between the Corporate Respondents and the forum state had to be established in order to exercise jurisdiction over them. The Fifth Circuit agreed with the district court that, although the New York Convention did not list personal jurisdiction as a ground for denying confirmation, the Due Process Clause required dismissal of the petition if personal jurisdiction was lacking. The court then addressed the petitioners' argument that the Corporate Respondents were alter egos of the PRC. The court found that, although the PRC was the owner of the Corporate Respondents, the evidence did not show the level of PRC's control over the Corporate Respondents that would be required to disregard their separate juridical identity.

In both cases, the court next examined whether it had subject matter jurisdiction over the PRC, which could only be the case if one of the exceptions to immunity listed in the FSIA applied. The court noted that there is an exception to immunity for confirmation proceedings where the foreign sovereign had signed the underlying arbitration agreement. However, in this case, only the Corporate Respondents, and not the PRC, had signed the relevant arbitration agreements. Therefore, because the court had previously found that the PRC and Corporate Respondents were not alter egos, none of the FSIA immunity exceptions applied, and there was no subject matter jurisdiction over the PRC.

B.5 New York Appellate Court holds that debt owed to foreign party can be attached in anticipation of an arbitration award against the foreign party, even where there is no jurisdictional connection to New York

In *Sojitz Corp. v. Prithvi Information Solutions, Inc.*, No. 602511/09 (N.Y. App. Div. 1st Dep't, 10 March 2011), the Petitioners alleged they were owed over USD 40 million by respondents under a contract containing an arbitration clause naming Singapore as the forum. Petitioners moved *ex parte* for, and were granted, an order of attachment for the amount allegedly owed in anticipation of arbitration. Upon a showing by respondents that they did not have sufficient contacts with New York to be subject to the personal jurisdiction of the New York courts, the New York Supreme Court vacated the USD 40 million order of attachment but upheld the attachment of approximately USD 18,000 owed to the respondent by a New York customer, whose money was located in New York.

On appeal, the appellate court upheld the attachment of the lesser amount under Section 7502(c) of the New York Civil Practice Laws and Rules, which allows the Supreme Court to grant an order of attachment in anticipation of an arbitration award in a foreign jurisdiction if an award may be rendered ineffectual without such provisional relief. The court noted that respondent did not challenge the showing that the award may be rendered ineffectual without the relief. Therefore, the only question was whether it was appropriate to attach a debt owed by a party lacking contacts with New York under the federal rules on personal jurisdiction. The court examined U.S. Supreme Court precedent on this issue, and particularly the decision in *Shaffer v. Heitner*, in which the U.S. Supreme Court remarked *in dicta* that minimum contacts over a defendant were not necessary where a court sought to attach property located in the state "as security for a judgment being sought in [another] forum." The appellate court held that this case fell within this exception and upheld the attachment despite the lack of contacts with the forum.

C. Trends and observations

While a number of concerns have arisen in the arbitral community over the past decade about various facets of the arbitral regime, a common thread among those concerns has been that arbitration is becoming unnecessarily costly and inefficient. The arbitral community has responded to this perception in various ways.

The most notable response has been efforts that have been undertaken to suggest ways to reduce the time and cost of arbitration. In 2007, the ICC published its first Commission Report on Techniques for Controlling Time and Costs in Arbitration, which offered a number of actions parties and arbitrators can take to ensure an efficient and economical process. The ICC Commission issued an updated version of that report in 2015.

In 2010, a working group of IBA's Arbitration Committee issued revised IBA Rules on the Taking of Evidence in International Arbitration, with a primary objective being to "provide an efficient, economical and fair process the taking of evidence in international arbitrations," which can be one of the most costly (and oftentimes adversarial) phases of any arbitration.[4] Several efforts have also been undertaken by the IBA, ICC, Chartered Institute of Arbitrators and CPR (among others) to manage efficiently the exchange of electronically stored information.

Lastly, several prominent arbitral institutions have revised their rules over the last decade to improve efficiency and decrease costs, with notable efforts being made to allow for multiparty or consolidated arbitrations before a single tribunal where possible and appropriate. Institutions have also sought to significantly reduce the time in which it takes to issue a final award.

As time and cost concerns have become more prominent, arbitrators have also been increasingly willing to allow dispositive motions and

---

[4] Preamble 1, IBA Rules on the Taking of Evidence in International Arbitration (IBA 2010).

the summary disposition of claims and defenses in arbitration. This trend is becoming particularly pronounced in both the international commercial and investor state arbitration arenas.

The practice of permitting dispositive motions and the summary adjudication of claims is relatively well-established within the United States' domestic arbitral regime. For instance, Section 15(b) of the Revised Uniform Arbitration Act of 2000, which is currently in force in 18 US states and the District of Columbia, allows for the "summary disposition of a claim or particular issue." The rules of several US-based arbitral institutions permit some form of summary adjudication for claims as well, including Rule 18 of the JAMS Comprehensive Arbitration Rules & Procedures, Rule 27 of the AAA Employment Arbitration Rules, Rule 31(b) of the AAA Construction Industry Arbitration Rules and Rule 12504 of the FINRA Code of Arbitration Procedure for Customer Disputes. Lastly, courts in the United States have been willing to uphold awards in which arbitrators effectively granted summary judgment or decided issues without conducting an oral evidentiary hearing on the merits, even when the right to entertain dispositive motions was not expressly enshrined in the arbitral rules at issue.

Dispositive motions and the summary adjudication of claims have nevertheless been historically disfavored in international arbitration under the notion that the practice is incompatible with the requirements of Article V.1(b) of the New York Convention. The historical antipathy toward dispositive motions in international arbitration is disappearing in the United States, however, as it is in other parts of the world.

For instance, the ICSID Rules were revised in 2006 to add Rule 41(5), which allows for the summary disposition of claims that are "manifestly without legal merit," and in October of 2013, the AAA Commercial Arbitration Rules, which are frequently administered by the ICDR in international disputes, were amended to permit dispositive motions as well. Those two developments have

significantly increased the use and acceptance of dispositive motions and summary adjudicative procedures in international arbitrations seated in the United States and have signaled to arbitrators that dispositive motions should be entertained in appropriate circumstances.

That trend is being embraced elsewhere as well, with the introduction of express summary adjudication standards in Rule 29 of the Sixth Edition of the SIAC Rules, which came into effect on 1 August 2016, and Article 39 of the 2017 SCC Rules, effective as of 1 January 2017. Consequently, the US trend toward greater acceptance of dispositive motions and summary adjudicative procedures is consistent with global tendencies.