Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard, Gordon E Kaiser and Benjamin Siino

Second Edition

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This article was first published in May 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-575-7

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

Acknowledgements

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

ADVOKATFIRMAN VINGE KB

ALSTON & BIRD LLP

BGP LITIGATION

CARMIGNIANI PÉREZ ABOGADOS

CECIL ABRAHAM & PARTNERS

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Challenging and Enforcing Arbitration Awards*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and more in-depth books and reviews. We also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature earlier than others. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes – and soon evidence and investor-state disputes – in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the original group of editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

Alas, as we were about to go to press, we were stunned by the unexpected demise of one of those editors, Emmanuel Gaillard. This news was as big a shock as I can recall. Emmanuel was one of three or four names who define international arbitration in the modern era. It was a delight to know him, and a source of huge satisfaction that he respected GAR, and it is hard to imagine professional life without him. Our sympathies go to his family and beloved colleagues, who I have no doubt will keep at least some of the magic alive.

David Samuels

London
April 2021

Contents

Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial – leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 166 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 163.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2020, *Global Arbitration Review*'s daily news reports contained hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2021, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Uganda fails to knock out rail-claim award
- Iranian state entity fails to overturn billion-euro award
- US Supreme Court rejects Petrobras bribery appeal
- Spanish court sets high bar for award scrutiny
- Swiss award against Glencore upheld on third attempt
- Tajik state airline escapes Lithuanian award
- Dutch court refuses to stay Yukos awards
- Undisclosed expert ties prove fatal to ICSID award
- Brazilian airline's award enforced in Cayman Islands
- ICC arbitrators targeted in Kenyan mobile dispute

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, in summer 2017, I raised the possibility of doing a book on the subject with David Samuels (Global Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in early April. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said almost 40 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide begins with a particularly welcome and inciteful foreword by Alan Redfern, recognised worldwide as one of the most thoughtful and experienced practitioners in our field. The guide is then structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this second edition, the 14 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and the special case of ICSID awards.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 26 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 51 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this second edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

London
April 2021

Part I

Issues relating to Challenging and Enforcing Arbitration Awards

8

Substantive Grounds for Challenge

Joseph D Pizzurro, Robert B García and Juan O Perla[1]

Introduction

For several decades, the conventional wisdom in arbitration law has been that arbitral decisions should be insulated from direct judicial review. Courts have accordingly shied away from delving into the merits or substance of arbitral awards. In recent years, this highly deferential, pro-enforcement paradigm is being increasingly tested and some courts seem to be showing a greater willingness to scrutinise arbitral awards.

This chapter looks at various avenues for challenging awards on substantive grounds. First, we explore a possible shift in judicial attitudes towards arbitration, tending to suggest that courts are taking a more active role in reviewing substantive aspects of arbitral awards. In line with that trend, we define 'substantive grounds' broadly to include mistakes of law or fact going to the overall substance of an arbitral decision, as opposed to only the merits of the underlying dispute, and distinguish these substantive defects from procedural or jurisdictional errors affecting only the arbitral process itself.[2] Second, we identify existing mechanisms for appealing mistakes of law or fact directly within certain arbitration institutions or in the courts of certain jurisdictions. Third, we survey recent court decisions to assess the viability of raising mistakes of law or fact, or other serious defects such as fraud or corruption, as grounds for challenging awards in collateral judicial proceedings under national arbitration laws and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention). Finally, we describe the *sui generis* investor-state arbitration regime created under the Convention on the

1 Joseph D Pizzurro is a partner and co-chair of the litigation department, Robert B García is a partner and Juan O Perla is an associate at Curtis, Mallet-Prevost, Colt & Mosle LLP. The authors thank William Hampson, counsel in Curtis' London office, and Marwa Farag, associate in Curtis' New York office, for their contributions.

2 See Chapters 5, 6 and 7.

Settlement of Investment Disputes between States and Nationals of Other States of 1966 (the ICSID Convention) and consider the possibility of challenging ICSID awards on substantive grounds.

An evolving paradigm for challenges on substantive grounds

The current 'enforcement friendly' system is largely attributable to the implementation of two of the most significant legal instruments governing arbitral awards: the New York Convention and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985.[3] These legal developments were a boon to international commercial arbitration.[4] That growth in cases carried over into investor-state arbitration with the ratification of the ICSID Convention and the subsequent proliferation of bilateral and multilateral investment treaties.[5]

As explained in more detail below, this international legal framework limits the extent to which courts are able to review arbitral awards. With rare exceptions, awards are not subject to direct appeal. Thus, any relief from a defective award is likely to occur in collateral judicial proceedings either to set aside the award in a supervisory or primary jurisdiction (also known as the seat of the arbitration) or to enforce the award in secondary jurisdictions. In either situation, there are no express provisions for directly challenging an award on 'substantive grounds', that is to say based on a general mistake of law or fact. Instead, grounds for challenging awards are geared towards correcting mistakes in the arbitral process itself, such as serious departures from basic procedural rights or deviations from the arbitral mandate (sometimes described as jurisdictional or admissibility errors).[6]

As this international legal regime made its way into domestic laws, many national courts began to shed any prior scepticism towards arbitration and adopted an explicitly pro-arbitration bias.[7] Accordingly, courts have significantly limited their review of arbitral awards to facilitate faster and easier enforcement across jurisdictions. In other words, courts have acted as strict enforcers of the parties' agreement to arbitrate and have deferred substantially to the legal and factual determinations of arbitral tribunals. Thus, under the existing legal framework, a party has little chance, if any, of successfully challenging the merits or substance of an arbitral award.

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3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958, http://www.newyorkconvention.org/new+york+convention+texts; United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. See Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Sections 1.01 to 1.03 (6th ed. 2015).

4 From 2012 to 2019, the overall caseload at major arbitral institutions has continued to grow significantly. See Markus Altenkirch and Brigitta John, 'Arbitration Statistics 2019 – How did arbitration institutions fare in 2019', *Global Arbitration News* (15 July 2020), https://globalarbitrationnews.com/how-did-arbitration-institutions-fare-in-2019/.

5 The number of International Centre for Settlement of Investment Disputes [ICSID] cases has grown exponentially in the past 25 years; see World Bank, 'The ICSID Caseload – Statistics' 7 (Issue 2021-1), https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf.

6 See *Redfern and Hunter on International Arbitration* (op. cit. footnote 3), at Sections 10.36, 10.41, 10.75.

7 See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 US 614, 631 (1985).

However, recent judicial decisions suggest that courts may be showing a greater willingness to flex their judicial muscle to correct excesses or abuses of arbitral power. Most notably, in 2018, the Court of Justice of the European Union (CJEU), the highest judicial authority on EU law, sent shock waves through the arbitration community when it ruled in *Slovak Republic v. Achmea* that EU Member States are precluded from agreeing to arbitrate disputes with investors from other EU Member States outside the EU judicial system,[8] effectively ending investor-state arbitration in its current form within the European Union.[9]

Achmea (a Dutch investor) brought claims against Slovakia pursuant to the arbitration provisions in a bilateral investment treaty (BIT) between the Slovak Republic and the Netherlands, both of which are EU Member States. Slovakia opposed the arbitral tribunal's jurisdiction, arguing that, on the state's accession to the European Union, the arbitration provision in the BIT was unenforceable under EU law.[10] The tribunal concluded that it had jurisdiction and rendered an award in favour of Achmea. Because the arbitration was seated in Germany, Slovakia applied to set aside the award in a German court. Germany's highest civil court, the Federal Court of Justice (BGH), referred the issue to the CJEU for a preliminary ruling. The CJEU agreed that Slovakia's accession to the European Union precluded the state from agreeing to arbitrate disputes with investors of other EU Member States under the BIT. Accordingly, the BGH annulled the award on the grounds that no valid arbitration agreement existed between the parties under EU and German law.[11]

Although the BGH's reason for annulling the award (the non-existence of a valid arbitration agreement) fits within the jurisdictional grounds for setting aside awards under the existing legal framework, this narrow characterisation of the issue obscures a more fundamental aspect of the court's decision. The court overruled the tribunal's determination of its own jurisdiction based on a substantive legal error, namely a mistake in the interpretation and application of EU law. Thus, in a broader sense, the *Achmea* decision is an example of an award that was set aside on substantive grounds because the German court reversed a mistake of law in the arbitral decision itself, as opposed to correcting only a mistake in the arbitral process.

Direct review on questions of law or fact

Although the default practice is to agree to final and binding arbitration without any appellate review, parties may still be able to obtain direct review of an adverse award by agreeing to arbitrate either under the rules of an arbitral institution that provides for direct appeals within the arbitration process or under the laws of a jurisdiction that allows for direct review by a court.

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8 Judgment of 6 March 2018, *Slovak Republic v. Achmea B.V.*, Case C-284/16, ECLI:EU:C:2018:158, paras. 45, 46, 48, 49, 62 [hereinafter *Achmea*].

9 Following the CJEU's *Achmea* decision, 23 of the 27 EU Member States concluded the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, which entered into force on 29 August 2020. European Commission, 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (5 May 2020), https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en.

10 *Achmea*, at para. 11.

11 *Slovak Republic v. Achmea B.V.*, Bundesgerichtshof [BGH] [Federal Court of Justice] 31 October 2018, I ZB 2/15, paras. 14, 15.

For instance, the American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution (ICDR), provide for direct review of awards within the arbitration process pursuant to the Optional Appellate Arbitration Rules, which 'apply a standard of review greater than that allowed by existing federal and state statutes' in the United States.[12] Under these rules, a new *ad hoc* panel of arbitrators is appointed to hear challenges to an award based on '(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous'.[13]

Similar optional appellate provisions are included in the arbitral rules of the International Institute for Conflict Prevention and Resolution (CPR) and the Judicial Arbitration and Mediation Services (JAMS). The CPR rules allow the new *ad hoc* appellate panel to set aside or modify an award if it '(i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record'.[14] Under the JAMS rules, the *ad hoc* appellate panel 'will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision' and 'may re-open the record' to review any evidence that was improperly excluded by the original arbitrators or new evidence that has become 'necessary in light of the [appellate] Panel's interpretation of the relevant substantive law'.[15] Other major institutions, such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), do not provide comparable appellate procedures.

Outside the arbitration process, few jurisdictions still permit direct appeals from arbitral awards in court. One prominent example is England. The English Arbitration Act explicitly provides for direct appeals in certain specified circumstances, but only on questions of English law, and only by agreement of all the parties to the arbitral proceedings or by leave of the court.[16] In practice, few applications make it 'over the leave requirement which has been designed to catch all but the most meritorious appeals'.[17] One exception is a 2019 decision by the High Court (Chancery Division) to set aside an award rendered by a sole arbitrator, finding that he had made a 'fundamental error of law' in interpreting the agreement by applying a subjective rather than an objective test of the parties' intent.[18]

12 American Arbitration Association [AAA], 'Optional Appellate Arbitration Rules' (1 November 2013), https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf.

13 id., at A-10. In the United States, parties cannot contractually expand the statutory grounds on which a court may review and set aside an award (*Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 US 576 (2008)), but there is no indication that such a prohibition extends to broader appellate review by arbitrators. In fact, a federal court in New York has confirmed an arbitral award modified under the AAA appellate procedures as if it were any other award rendered under the Federal Arbitration Act (*Hamilton v. Navient Sols. LLC*, No. 18-cv-5432 (PAC), 2019 US Dist. LEXIS 24412 (SDNY 14 February 2019)).

14 The International Institute for Conflict Prevention and Resolution, 'Appellate Arbitration Procedure', Rule 8.2(a) (2015), https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure.

15 Judicial Arbitration and Mediation Services, 'JAMS Optional Arbitration Appeal Procedure', Section (d) (June 2013), p. 5, https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf.

16 English Arbitration Act 1996, Section 69.

17 David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration*, 531 (24th ed. 2015).

18 *Martin v. Harris* [2019] EWHC 1962 (Ch), para. 61.

Parties may contract out of this appellate review by explicitly waiving the right to appeal in the contract or by selecting arbitral rules that expressly waive any right to appeal or other forms of recourse, such as Article 35(6) of the ICC Rules and Article 26(8) of the LCIA Rules.[19] However, a provision in an arbitration agreement that the award shall be 'final, conclusive and binding' has been deemed to be insufficiently clear to waive this right.[20]

Collateral review under national arbitral laws and the New York Convention

In the absence of a direct appeal, a party may still be able to attack an award in collateral judicial proceedings in two ways. One option is to oppose enforcement of the award wherever the prevailing party tries to enforce it. The New York Convention, with more than 160 contracting states, provides the nearly universal defences against recognition and enforcement of awards.[21] A successful defence would not extinguish the award, but would avoid enforcement in that jurisdiction and could preclude enforcement in other jurisdictions as well.[22]

The other option is to apply to have the award set aside or annulled by a court in a primary jurisdiction. Under the New York Convention, there may be two primary jurisdictions (i.e., 'the country in which, *or* under the law of which, that award was made').[23] The most common grounds for setting aside an award are set forth in Article 34 of the UNCITRAL Model Law, which forms the basis of arbitration laws in more than 110 jurisdictions.[24]

If the award is properly set aside, courts in other countries or secondary jurisdictions may recognise the annulment decision and refuse to enforce the award under the New York Convention.[25] However, nothing in the New York Convention or the UNCITRAL Model Law mandates recognition of an annulment decision.[26] Some courts have enforced

19 See, e.g., *Lesotho Highlands v. Impregilo* [2006] 1 AC 221, para. 3.

20 See, e.g., *Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm), para. 36.

21 'Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)', https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

22 See Gary Born, *International Commercial Arbitration*, Vol. III 3391 (2nd ed. 2014).

23 New York Convention, Article V(1)(e) (emphasis added).

24 UNCITRAL, 'Status – UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006', https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

25 See, e.g., *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 936 (DC Cir. 2007) ('[A]n arbitration award does not exist to be enforced in other Contracting States [under the New York Convention] if it has been lawfully "set aside" by a competent authority in the State in which the award was made.'); *Luxembourg No. 7, PEMEX – Exploracion y Produccion v. Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V.*, Court of Appeal of Luxembourg, Case No. 59/17, 27 April 2017, in *Yearbook Commercial Arbitration*, Volume XLII (van den Berg, ed. 2017) [hereinafter *Luxembourg PEMEX* decision] (refusing to enforce an award under the New York Convention because it had been annulled at the seat of the arbitration and therefore 'produce[d] no effects . . . in its country of origin'); see also Born, *International Commercial Arbitration* (op. cit. footnote 22), at 3390.

26 Both the Model Law and the New York Convention provide that a court 'may' refuse to recognise and enforce an award that has been set aside by a competent authority. UNCITRAL Model Law, Article 36(1)(a)(v); New York Convention, Article V(1)(e).

awards notwithstanding the fact that they had been annulled in a primary jurisdiction, for instance when the annulment decision is 'repugnant to fundamental notions of what is decent and just'.[27]

As is evident from a side-by-side comparison (see table below), the grounds for challenging an award in set-aside proceedings under the UNCITRAL Model Law and in enforcement proceedings under the New York Convention are practically identical.

Article 34 of the UNCITRAL Model Law	*Article V of the New York Convention*
A party to the arbitration agreement . . . was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or	The parties to the [arbitration] agreement . . . under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or	The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside; or	The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or	The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
	The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or
The subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or	The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
The award is in conflict with the public policy of this State.	The recognition or enforcement of the award would be contrary to the public policy of that country.

Under both legal regimes, the grounds for attacking an award are limited primarily to serious deviations from constitutive or procedural aspects of the arbitration, for example a failure to act within the scope of the arbitration agreement or a failure to abide by basic standards of due process. In addition, an award may be disregarded if it decides an issue that is not arbitrable (i.e., not capable of settlement by arbitration under the state's domestic law), or if it is otherwise contrary to public policy insofar as it violates the forum's

27 See, e.g., *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 99 (2d Cir. 2016) [hereinafter *United States PEMEX* decision].

fundamental notions of justice and morality or contravenes important national interests.[28] Notably, neither legal regime includes express provisions for directly attacking the merits or substance of an arbitral decision, whether based on a mistake of fact or law. Despite these similarities, the odds of success may vary depending on whether an award is challenged in set-aside or enforcement proceedings because courts in different jurisdictions may apply different standards of review and may respond differently to the same award.[29]

Arbitration laws that are not based on the UNCITRAL Model Law can be similarly or even more restrictive in leading arbitral jurisdictions. In the United States, the Federal Arbitration Act (FAA) provides the exclusive grounds for a federal court to set aside or 'vacate' an award:

> *(1) where the award was procured by corruption, fraud, or undue means;*
> *(2) where there was evident partiality or corruption in the arbitrators, or either of them;*
> *(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or*
> *(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.*[30]

As with the UNCITRAL Model Law, the FAA does not expressly include grounds for vacating an award on the basis of general mistakes of law or fact.[31] The same is true under Swiss and French arbitration laws.[32] French law is even more restrictive with respect to international awards. Unlike domestic awards, which are subject to review based on French standards of morality and justice (*ordre public interne*), international awards – regardless of where they were rendered – are subject to a presumably narrower standard of review under internationally recognised norms (*ordre public international*).[33]

In short, the only realistic way to attack an arbitral award on substantive grounds in collateral proceedings is to present a challenge within the context of the express provisions found in the New York Convention or the relevant state's domestic arbitration law. Recent court decisions setting aside or refusing enforcement of awards illustrate this point.

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28 See *Redfern and Hunter on International Arbitration* (footnote 3), at Sections 10.82, 10.83.

29 Compare *Luxembourg PEMEX* decision (footnote 25) with *United States PEMEX* decision (footnote 27); compare also *Alstom Transport SA v. Alexander Brothers Ltd.*, Paris Court of Appeal, 28 May 2019, No. 16/11182 [hereinafter *Alstom*] with *Alexander Brothers Limited v. Alstom Transport SA* [2020] EWHC 1584 (Comm) (18 June 2020).

30 9 USC Section 10(a).

31 See *Hall St.*, 552 US at 584; *United Paperworkers Int'l Union v. Misco, Inc.*, 484 US 29, 38 (1987).

32 See Swiss Federal Private International Law Act 1987, Article 190; French Code of Civil Procedure 2011, Article 1492.

33 French Code of Civil Procedure 2011, compare Article 1492 5° with Article 1520 5°. See *Redfern and Hunter on International Arbitration* (op. cit. footnote 3), at Section 10.84; Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration*, Section 1.159 (2nd ed., 2010).

Fraud, corruption and other public policy violations

A significant development affecting the enforcement of arbitral awards is the emergence of fraud and corruption as substantive grounds for challenge. In some jurisdictions, courts seem willing to relax the traditionally stringent standard for reviewing awards to revisit allegations of fraud or corruption or to consider them for the first time.

To remain within the legal framework established by the UNCITRAL Model Law and the New York Convention, courts have relied on public policy to reject awards that are tainted by fraud or corruption, not only in the arbitral process itself but also in the underlying transaction. Again, courts are free to disregard an award if they believe it violates their own state's public policy. As a general matter, an award is contrary to public policy if it is repugnant to fundamental notions of justice or morality, or if it contravenes important national interests.[34] Because of its inherent vagueness, the public policy defence seems to provide the greatest latitude for courts to overturn infirm awards.

For now, French courts seem to be leading the charge against fraud or corruption in international arbitration. This is especially remarkable because, in France, as explained above,[35] international awards are only subject to review for violations of internationally recognised norms rather than purely domestic norms, and courts must normally find that the alleged public policy violation satisfies the heightened standard of being 'flagrant, effective and concrete'.[36]

For instance, in 2018, the Paris Court of Appeal cited public policy as a basis for vacating an ICC award because it had the effect of conferring international legal protection on an investment secured by defrauding government authorities in derogation of the 'international consensus' respecting every state's right to control foreign investments within its territory.[37] The Court ruled that it had the power to review an award 'in law and in fact' to determine whether it violated international public order.[38] In 2019, the Paris Court of Appeal again invoked public policy to refuse enforcement of an award because it violated the 'international consensus' prohibiting bribery of public officials.[39] The Court emphasised that it had the power to investigate all relevant facts, regardless of whether they were presented to or addressed by the arbitrators, in determining whether the underlying contract was tainted by corruption.[40]

In 2020, the Paris Court of Appeal set aside two ICC awards rendered in favour of a French construction company against Libya, finding fraudulent collusion between the French company and a public official in the procurement of the underlying contract. It bears noting that corruption had not been alleged during the arbitration even though the

34 See *Redfern and Hunter on International Arbitration* (op. cit. footnote 3), at Sections 10.82, 10.83.

35 See subsection 'Challenging awards in collateral proceedings: National arbitration laws and the New York Convention'.

36 *Société MK Group v. S.A.R.L. Onix*, Paris Court of Appeal, 16 January 2018, No. RG 15/21703, p. 8 [hereinafter *Société MK Group*], http://web.lexisnexis.fr/LexisActu/CAParis16janv20181521703.pdf.

37 id. at 5, 8.

38 id. at 4.

39 *Alstom*, at 6.

40 *Alstom Transport SA v. Alexander Brothers Ltd.*, Paris Court of Appeal, 10 April 2018, No. 16/11182 (10 April 2018), p. 5.

facts relied on before the Court were available at the time.[41] Still, the Court found that enforcing an award infected with corruption would be contrary to international public policy.[42] Because of the difficulty of proving actual corruption through direct evidence, French courts have developed a circumstantial evidence standard based on 'serious, precise and consistent indicia' (*faisceau d'indices*) of fraud or corruption.[43]

The Hague Court of Appeal adopted a similar approach in a 2019 case, in which it refused to enforce an award because of 'strong indications' of corruption during the procurement of the underlying contract.[44] The Court ruled that it had the power to assess independently whether the contract had been procured through corruption based on evidence that had been dismissed by the tribunal on procedural grounds, as well as facts that occurred after the award was rendered.[45] It held that the general premise that an enforcement proceeding is not to be treated as a disguised appeal should not prevent compliance with a fundamental rule of law, such as the prohibition against corruption.[46]

This 'red flags' methodology seems to have originated with the concept of 'warning signs' under the US Foreign Corrupt Practices Act.[47] It also mirrors the 'badges of fraud' analysis developed in the common law tradition, an approach that US courts continue to use in various contexts.[48] Despite these links to US law, it remains to be seen whether US courts will follow a similar approach. Although the US Court of Appeals for the District of Columbia Circuit has made clear that the '"fundamental equitable principle" preventing courts from being made parties to fraud or other criminal acts' applies with equal force under the New York Convention's public policy exception and extends to awards tainted by fraud in the underlying contract,[49] the US Court of Appeals for the Second Circuit in New York has suggested that fraud in the underlying contract is 'a matter to be determined exclusively by the arbitrators'.[50] Regardless, some courts seem to be coalescing around a three-part test for determining whether an award should be set aside or vacated based on fraud:

- the fraud could not have been discovered before or during the arbitration;

41 *Libya v. Sorelec*, Paris Court of Appeal, 17 November 2020, No. RG 18/02568, p. 7.

42 id.

43 *Alstom*, at 7; see also Emmanuel Gaillard, 'The emergence of transnational responses to corruption in international arbitration', in William W Park (ed.), 35 *Arbitration International* 1 (2019), 1, 9 ('Arbitral tribunals are not alone in applying the red flags methodology to allegations of corruption and illegality. In a series of recent cases, French courts have also applied the red flags methodology in proceedings to set aside arbitral awards.').

44 *Bariven SA v. Wells Ultimate Service LLC*, The Hague Court of Appeal, 22 October 2019, ECLI:NL:GHDHA:2019:2677, para. 5.8.

45 id., at paras. 5.6 and 5.7.

46 id., at para. 5.6.

47 See Lucinda Low, 'Dealing with Allegations of Corruption' in *International Arbitration*, 113 AJIL Unbound 341 (2019), 343.

48 See *Bfp v. Resolution Tr. Corp.*, 511 U.S. 531, 540 to 541 (1994).

49 *Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria*, 844 F.3d 281, 287 to 289 (2016).

50 *Europcar Italia, S.P.A. v. Maiellano Tours*, 156 F.3d 310, 315 (2d Cir. 1998). As recently as 2020, a federal district court in New York indicated that the public policy exception under the New York Convention could apply if the award itself was the product of corruption, but reiterated that a claim of corruption in the underlying contract was 'a matter to be determined exclusively by the arbitrators'. *Commodities & Minerals*

- there is a material connection between the fraud and an issue decided in the arbitration; and
- proof of fraud by 'clear and convincing evidence'.[51]

Substantive errors as excesses or abuses of arbitral power

Even though it is not expressly included in the FAA, US courts have recognised the doctrine of 'manifest disregard of the law' as a proper basis for vacating awards, including international awards rendered in the United States.[52] The US Supreme Court has explained that 'manifest disregard of the law', as opposed to general errors of law, may be a proper basis for review under one of the FAA's express provisions, such as when the arbitrators are guilty of misconduct or exceed their powers.[53] As a general rule, this doctrine applies when two criteria are met: '(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case'.[54]

Although this defence rarely succeeds, in 2019, the US Court of Appeals for the Ninth Circuit affirmed a lower court's decision to vacate an international award rendered in the United States under the FAA because the arbitrators' decision was 'completely irrational' and in 'manifest disregard of the law'.[55] In that case, a US government contractor, ECC, awarded subcontracts to a local company, Aspic, for two construction projects in Afghanistan pursuant to ECC's prime contract with the US Army Corps of Engineers. Under the terms of the subcontracts, Aspic were obliged to comply with US regulations applicable to ECC as a government contractor, the Federal Acquisition Regulations (FAR), including provisions relating to termination of contracts and settlement procedures.

Enter. v. CVG Ferrominera Orinoco No. 1:19-cv-11654-ALC, 2020 U.S. Dist. LEXIS 223954, at *17 (S.D.N.Y. 30 November 2020).

51 See, e.g., *Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d 187, 199 (D.D.C. 2018) (collecting cases). US courts may also be showing signs of loosening the tightly restricted public policy defence with respect to other substantive aspects of arbitral awards. A federal district court in Washington, DC, refused to confirm an award against India on public policy grounds (*Hardy Exploration & Production (India) v. Gov't of India*, 314 F. Supp. 3d 95, 110 to 116 (DDC 2018)). The court found that the penal nature of the interest awarded had the 'practical effect' of coercing India into complying with the specific performance ordered by the award and so enforcing the award would violate US public policy respecting the sovereignty and independence of nations and, furthermore, would contravene US law on foreign sovereign immunity, which expressly prohibits holding foreign states liable for punitive damages. The US Foreign Sovereign Immunities Act expressly states that foreign states 'shall not be liable for punitive damages.' 28 USC Section 1606.

52 *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys 'R' Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997).

53 *Hall St.*, 552 US at 584, 585. Some federal courts of appeals have rejected this interpretation, raising the prospect that the Supreme Court will revisit this issue in the near future. See, e.g., *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011); *Citigroup Glob. Mkts Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009).

54 *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (*citation omitted*); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95, 97 (2d Cir. 2008), rev'd on other grounds, 559 U.S. 662, 672 n.3 (2010).

55 *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1166 (9th Cir. 2019) (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)).

Eventually, the Army Corps of Engineers terminated the prime contract and ECC accordingly cancelled the subcontracts. Aspic claimed that it was owed certain expenses and termination costs, but ECC refused to pay, in part because Aspic had failed to properly present its settlement costs as required by the relevant FAR provisions. Aspic filed for arbitration pursuant to the subcontracts, and the sole arbitrator issued an award in favour of Aspic for more than US$1 million on the basis that it would be unreasonable and unjust to hold a local Afghan company to the same strict standards as a US contractor.[56] A federal district court in California vacated the award and the court of appeals affirmed. The latter reasoned that the arbitrator erred as a matter of law and thereby exceeded its authority in concluding that Aspic need not comply with the FAR provisions.[57]

Similarly, in France, in 2019, the Paris Court of Appeal partially set aside an award on the grounds that the arbitral tribunal exceeded its mandate by erroneously awarding damages for claims that the tribunal itself had concluded to be outside its temporal jurisdiction.[58] A Canadian gold mining company, Rusoro, had acquired interests in certain mining projects in Venezuela between 2006 and 2008. In 2009, Venezuela enacted various measures restricting exports of gold and regulating foreign exchange. In 2011, Venezuela nationalised the gold mining sector. Rusoro submitted a request for arbitration, claiming that Venezuela had breached its obligations under the Canada–Venezuela BIT by enacting restrictive measures in 2009 and expropriating Rusoro's gold mining interests in 2011.

The arbitral tribunal found that the claims based on the 2009 measures were time-barred under the BIT. Nevertheless, it awarded Rusoro US$967 million plus interest in compensation for the alleged expropriation based on the value of the company's shares in 2008, without taking into account the decrease in value caused by the restrictive measures imposed in 2009. The Paris Court of Appeal reviewed the relevant elements of law and of fact and concluded that it was an error to award damages for losses that were caused by measures that fell outside the tribunal's mandate.[59]

Substantive review under the ICSID Convention

An entirely different regime applies to awards rendered under the ICSID Convention, which creates a 'self-contained' arbitration system for investor-state disputes separate and apart from the regime created under the New York Convention and the UNCITRAL Model Law.[60] The ICSID Convention provides the exclusive mechanism for annulling an award within the ICSID system itself. An *ad hoc* committee composed of three ICSID-appointed arbitrators considers the annulment application.

56 id., at 1168.

57 id.

58 *République Bolivarienne du Venezuela v. Société Rusoro Mining Limited*, Paris Court of Appeal, 29 January 2019, No. RG 16/20822, No. Portalis 35L7-V-B7A-BZ2EA [hereinafter *Société Rusoro*], https://www.italaw.com/sites/default/files/case-documents/italaw10298.PDF; see also Tom Jones and Sebastian Perry, 'Billion-dollar award set aside in Paris', *Global Arbitration Review* (30 January 2019), https://globalarbitrationreview.com/article/1179819/billion-dollar-award-set-aside-in-paris.

59 *Société Rusoro* at 4, 9.

60 See Christoph Schreuer, *The ICSID Convention: A Commentary*, 1103, 1154 (2d ed. 2009).

Article 52 of the ICSID Convention sets forth the exclusive grounds for annulling an ICSID award:

- the tribunal was not properly constituted;
- the tribunal has manifestly exceeded its powers;
- there was corruption on the part of a member of the tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the award has failed to state the reasons on which it is based.

As with the UNCITRAL Model Law, these provisions relate primarily to the integrity of the arbitration process and do not expressly include errors in the substance of the arbitral decision. Nevertheless, *ad hoc* committees have annulled awards for serious mistakes of law under an excess of powers rubric, for instance when the arbitral tribunal failed to apply the proper law, or its misinterpretation or misapplication of the law was 'so gross or egregious as substantially to amount to failure to apply the proper law'.[61]

One example is Venezuela's success in having an ICSID award partially annulled for failure to apply the proper law in calculating damages.[62] The arbitrators awarded certain subsidiaries of ExxonMobil approximately US$1.6 billion in compensation for various claims, including for an expropriation under the Netherlands–Venezuela BIT. The *ad hoc* committee reviewed the award and found that the tribunal had disregarded the terms agreed by the parties for computing damages and instead had applied general principles of international law.[63] The *ad hoc* committee disagreed with the tribunal's decision on the applicable law and 'the way in which the Tribunal put that decision into effect'.[64] It concluded that the tribunal had exceeded its powers and, accordingly, annulled the relevant portion of the award, which amounted to a reduction of more than US$1.4 billion.[65]

Unless an award is annulled in accordance with the ICSID Convention, each contracting state is required to enforce it as if it were a final judgment of its domestic courts.[66] The New York Convention's grounds for resisting enforcement do not apply. Thus, challenging ICSID awards in court is even more difficult because, in theory, they are not subject to judicial review on any grounds. Nevertheless, the saga involving intra-EU investor-state arbitration has shown that ICSID awards may be susceptible to judicial oversight as well. In February 2019, a Swedish court refused to enforce an ICSID award because, in effect, it directed Romania, an EU Member State, to grant impermissible subsidies, or state aid, to investors of another EU Member State in violation of EU law. The court recognised

61 *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, para. 86; see, e.g., *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, paras. 164 to 165; *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, para. 48, 56.

62 *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017.

63 id., at paras. 143, 150, 165, 186, 187.

64 id., at para. 175.

65 id., at paras. 188(a), 189.

66 ICSID Convention, Article 54.

that the ICSID Convention called for recognition and enforcement of the award as if it were a final judgment of a Swedish court, but reasoned that a Swedish court judgment that violated EU law would also be unenforceable.[67]

In the United States, the notion that ICSID awards are automatically enforceable against foreign states has been rejected. Under the federal statute implementing the ICSID Convention, ICSID awards must be enforced in federal court as if they were final judgments of a court of a constituent state.[68] For many years, federal district courts in New York believed this provision permitted the use of state court procedures to convert ICSID awards into federal judgments in summary proceedings without notice to the award debtor. In 2017, however, the US Court of Appeals for the Second Circuit put an end to that decades-old practice and ruled that proceedings to enforce ICSID awards against a foreign state are subject to the procedural and substantive requirements of the US law on foreign sovereign immunity, including its service of process, venue and jurisdictional immunity provisions.[69]

Conclusion

Mounting a successful challenge against an arbitration award on substantive grounds is not easy, but it is not impossible. Courts across jurisdictions, including in so-called 'arbitration friendly' jurisdictions, have shown that they will not blindly enforce awards containing egregious mistakes of law or other serious defects. Indeed, recent court decisions seem to suggest that, in light of a growing suspicion of arbitration within many communities, some courts may be rediscovering their scepticism about unfettered arbitral power and reasserting their own power to scrutinise awards more closely.

67 See Tom Jones, 'Miculas suffer setback in Sweden', *Global Arbitration Review* (4 February 2019), https://globalarbitrationreview.com/article/1179932/miculas-suffer-setback-in-sweden.

68 22 USC Section 1650a.

69 *Mobil Cerro Negro, Ltd v. Bolivarian Republic of Venezuela*, 863 F.3d 96 (2d Cir. 2017).

Appendix 1

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ISBN 978-1-83862-575-7