

VACATING AN INTERNATIONAL ARBITRATION AWARD RENDERED IN THE UNITED STATES: DOES THE NEW YORK CONVENTION, THE FEDERAL ARBITRATION ACT OR STATE LAW APPLY?

By

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I. INTRODUCTION

When an international arbitration award is issued in the United States, and one party wants to have the award confirmed, enforced or vacated, three different bodies of law are potentially implicated: (1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),¹ (2) the Federal Arbitration Act ("FAA"),² and (3) state law. A recent decision by the United States Court of Appeals for the Third Circuit in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*³ highlights the complex interaction of these laws in the context of an attempt to vacate an international award. The case demonstrates both why the parties' selection of the seat of an arbitration is critical and why parties must take care in drafting arbitration clauses.

This article begins by examining the relevant provisions of the Convention, the FAA, and the role of state law. For an illustration of the interplay of these provisions, it then discusses the Third Circuit's decision in *Ario*, where the Third Circuit held that the grounds for vacatur of an international arbitration award issued in the United States are the same grounds as those applied to a domestic arbitration award. By this decision, the Third Circuit joined other circuits that have

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¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

² 9 U.S.C. §§ 1-16, 201-08, 301-07 (2011).

³ *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277 (3d Cir. 2010).

held that the grounds for vacatur set forth in the FAA applicable to domestic arbitration awards also apply to international arbitration awards rendered within the United States. However, a few courts have held that a motion to vacate an international award rendered in the United States should be decided only under the New York Convention's more limited grounds for review. The result of this split in the case law is that parties and practitioners must be aware of the jurisdiction within the United States where a motion to vacate an award is likely to be brought. As discussed below, whether the New York Convention or the FAA governs also has important implications with respect to certain procedural rules that apply to the application to vacate.

II. THE THREE BODIES OF LAW IMPLICATED BY A MOTION TO VACATE

A. *The New York Convention*

The New York Convention, which has been in force in the United States for almost 40 years and has been ratified or acceded to by more than 140 countries, provides a relatively straightforward and effective mechanism for the enforcement of arbitral awards throughout the world. The goal of the New York Convention is "to encourage the recognition and enforcement of *international* arbitration awards and agreements";⁴ its "underlying theme . . . as a whole is clearly the autonomy of international arbitration."⁵

The New York Convention applies to (a) arbitral awards that are made in a country which is a party to the Convention other than the country where enforcement is sought, or (b) awards that are "not considered as domestic awards

⁴ *Jacada (Europe) Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 705 (6th Cir. 2005).

⁵ *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008) (quoting PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 250 (Emmanuel Gaillard & John Savage eds., 1999)).

in the [country] where their recognition and enforcement is sought."⁶ Thus, whether an award is considered international or domestic is determined by the law of the country where recognition or enforcement is sought, rather than the Convention.

B. The FAA

In the United States, the New York Convention is implemented through the FAA. As the Supreme Court has explained, "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"⁷ The FAA consists of three chapters. Chapter 1⁸ contains "a set of default rules 'designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate'";⁹ Chapter 2 implements the New York Convention and governs international or non-domestic awards;¹⁰ and Chapter 3 provides for the enforcement of the Inter-American Convention on International Commercial Arbitration, also known as the Panama Convention,¹¹ and sets forth the interplay between the New York Convention and the Panama Convention.¹²

⁶ New York Convention, *supra* note 1, art. I, 21 U.S.T. at 2519. This approach was adopted to accommodate a divergence of opinion between civil law countries, which considered "the nationality of an award [to be] determined by the law governing the procedure," *Jacada (Europe)*, 401 F.3d at 705 (quoting *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 931 (2d Cir. 1983)), and common law countries, which "favored a simple rule under which an award was domestic in the country it was entered and foreign elsewhere." *Id.*

⁷ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (alterations in original) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

⁸ 9 U.S.C. §§ 1-16.

⁹ *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 288 (3d Cir. 2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989)).

¹⁰ 9 U.S.C. §§ 201-208.

¹¹ Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12, O.A.S.T.S. No. 42, 14 I.L.M. 336 [hereinafter Panama Convention]. The following states have ratified the Panama Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela. The only OAS

Chapter 2 defines what awards constitute international or non-domestic arbitration awards and are thus covered by the New York Convention:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.¹³

Application of Chapter 2 of the FAA is not limited to awards rendered outside the United States. Rather, under the FAA, an arbitration award issued in New York, in a commercial dispute governed by New York law, in favor of a New York citizen, would nevertheless be considered an international award if another party to the arbitration was not a U.S. citizen, or alternatively, if it involved a dispute relating to property or performance outside of the United States.¹⁴

The FAA also provides, however, that "Chapter 1 [of the FAA, governing domestic disputes,] applies to actions and proceedings brought under [Chapter 2] to the extent that chapter is not in conflict with [Chapter 2] or the Convention as

member states that have not ratified the Convention are the Dominican Republic and Nicaragua.

¹² 9 U.S.C. §§ 301-307.

¹³ 9 U.S.C. § 202.

¹⁴ *See, e.g.*, *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476-78, 481-82 (7th Cir. 1997) (award issued in New York in dispute between two U.S. firms for distribution of U.S.-manufactured products in Poland found to be non-domestic under 9 U.S.C. § 202). *See also* *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) (arbitration was non-domestic, even though it took place in New York, where assets were located in Israel, some parties resided in Israel and governing law was based on a foreign system).

ratified by the United States."¹⁵ Thus, the federal law governing domestic arbitrations may also be implicated in connection with the judicial review of an international award. Then, as a result, state law may also come into play because, as discussed below, the FAA also permits parties to agree that state arbitration law will apply to certain aspects of their arbitration.

C. *Recognition or Enforcement of an Award Under the New York Convention*

As discussed above, the New York Convention may apply to arbitration awards issued in the United States because some of these awards will be considered to be international or non-domestic under the FAA.¹⁶

While the New York Convention sets forth the grounds on which a court may refuse to recognize or enforce an international award, it does not explicitly deal with the grounds that are available on a motion to vacate or set aside an arbitral award. The New York Convention provides that a court "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon"¹⁷ unless the party against whom the award is invoked provides "proof" that one of seven limited grounds for non-recognition exists.¹⁸ One of the seven grounds set forth in Article V(1)(e) is

¹⁵ 9 U.S.C. § 208.

¹⁶ See 9 U.S.C. § 202; New York Convention, *supra* note 1, art. I(1), 21 U.S.T. at 2519.

¹⁷ New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519.

¹⁸ See *id.*, art. V, 21 U.S.T. at 2520. Article V provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, 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

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the

that the award "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."¹⁹

Article V(1)(e) appears to draw a distinction between courts of the country "in which, or under the law of which, that award was made,"²⁰ and courts of countries where enforcement of the award is sought. This divide has been recognized as creating a distinction between courts with "primary" jurisdiction (i.e., jurisdiction to set aside or vacate an arbitral award), and "secondary" jurisdiction (i.e., without jurisdiction to set aside or vacate an award, but with jurisdiction to deny enforcement of an award). As the Fifth Circuit has recognized,

arbitration proceedings or was otherwise unable to present his case; or

(c) 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

(d) 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

(e) 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Id. The grounds to refuse recognition of a foreign award under the New York Convention are identical to the grounds contained in the Panama Convention. *See* Panama Convention, *supra* note 12, art. 5.

¹⁹ New York Convention, *supra* note 1, art. V(1)(e), 21 U.S.T. at 2520; *see also* 9 U.S.C. § 207.

²⁰ New York Convention, *supra* note 1, art. V(1)(e), 21 U.S.T. at 2520.

"[o]nly a court in a country with primary jurisdiction over an arbitral award may annul that award."²¹

The Convention contains no description of or limitation on the capacity of the jurisdiction where the award was rendered to apply its own law vacating the award.²² This means that the parties' choice of the seat of arbitration can have significant consequences for any judicial review of the award. According to one scholar, the Convention "entrusts the place of arbitration with significant power to enhance, or to impair, the international effectiveness of an award rendered within its territory. The ways courts at the arbitral seat exercise, or fail to exercise, their power to set an award aside generally will determine the award's international currency."²³

D. *Vacating an Arbitral Award in the United States*

For the reasons discussed above, in order for a party to invoke Article V(1)(e) of the New York Convention as a ground for denying enforcement of the award, an international award made in the United States would need to be vacated by a U.S. court under U.S. law.²⁴ Under U.S. law, a threshold question arises as to whether a motion to vacate an award is governed by the FAA standards for vacatur or by the arbitration law of the state in which the award was made, or of the state whose law governs the parties' contract. Although the Supreme Court held in a

²¹ *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004); *See also M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 849 (6th Cir. 1996) ("We hold . . . that such a motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes.").

²² *See* William W. Park, *The International Currency of Arbitral Awards*, in *INTERNATIONAL ARBITRATION 2007* 309, 333 (PLI Litig. & Admin. Practice, Course Handbook Series No. 756, 2007); *see also* George A. Bermann, *Jurisdiction: Courts vs. Arbitrators*, in *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK* 135, 169 (James H. Carter & John Fellas eds., 2010).

²³ WILLIAM W. PARK, *INTERNATIONAL FORUM SELECTION* 127 (1995).

²⁴ *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 21-23 (2d Cir. 1997).

case involving a domestic arbitration that, as a general matter, the FAA does not preempt state law,²⁵ in this specific context, the FAA standards for vacatur are widely recognized to preempt state grounds for vacatur unless the parties clearly provide otherwise in their agreement.²⁶

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,²⁷ the Supreme Court expressly left open the possibility that parties may select state law to govern enforcement or vacatur of an arbitral award, stating:

The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11 [of the FAA], deciding nothing about other possible avenues for judicial enforcement of arbitration awards.²⁸

Several Courts of Appeals have also contemplated that parties may displace the federal standard for vacatur with a state law standard, but only if they do so explicitly in their agreements.²⁹

²⁵ See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration").

²⁶ See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2565 (2009) ("It is well-settled that federal standards for vacatur under the FAA are preemptive under U.S. law, superseding more expansive grounds for vacatur under state law."); *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 292 (3d Cir. 2010) ("[T]he FAA standards control "in the absence of contractual intent to the contrary." (alteration in original) (quoting *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 296 (3d Cir. 2001) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995))))).

²⁷ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

²⁸ *Id.* at 590.

²⁹ See, e.g., *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 292-93 (3d Cir. 2010); *Jacada (Europe) Ltd. v. Int'l Mktg.*

Assuming that the parties have not explicitly chosen a state law regime for vacatur, parties may move to vacate arbitral awards made in the United States under Section 10 of the FAA,³⁰ which provides the exclusive grounds for vacatur of awards under the FAA.³¹ Under Section 10, a court may vacate an award for the following reasons:

- (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 misbehavior 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.³²

These grounds to vacate under the FAA overlap to a large extent with the grounds to deny enforcement contained in Article V of the Convention, but are also

Strategies, Inc., 401 F.3d 701, 711-12 (6th Cir. 2005) (generic choice of law clause was not sufficient evidence to demonstrate that the parties intended to displace the federal standard for vacatur); *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 342-43 (5th Cir. 2004) (holding that agreement at issue's "choice-of-law provision [did] not express the parties' clear intent to depart from the FAA's vacatur standard").

³⁰ 9 U.S.C. § 10.

³¹ See *Hall St. Assocs.*, 552 U.S. at 583-84. In *Hall Street Associates*, the Court held that parties could not expand the scope of judicial review under the FAA by contract. See *id.* at 583-84 & n.5, 586-87.

³² 9 U.S.C. § 10(a).

somewhat broader.³³ For example, the FAA authorizes vacatur of an award for an arbitrator's refusal to postpone a hearing or refusal to hear pertinent evidence.³⁴ By contrast, the New York Convention permits a court to deny recognition only where "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."³⁵ The inability to present one's case is a somewhat narrower ground than the ground for vacatur enunciated in the FAA.³⁶ Additionally, while there is currently a debate about whether "manifest disregard for the law" remains a viable ground for vacatur under the FAA after the Supreme Court's decision in *Hall Street Associates*,³⁷ it is undoubtedly not a ground on which to deny enforcement under the Convention.³⁸

³³ See *Ario*, 618 F.3d at 290 n.9.

³⁴ 9 U.S.C. § 10(a)(3).

³⁵ New York Convention, *supra* note 1, art. V(1)(b), 21 U.S.T. at 2520.

³⁶ On the other hand, because the grounds for vacating an arbitral award under the FAA and denying the recognition and enforcement of an award under the New York Convention are similar in some respects, whether the FAA or the New York Convention govern a motion to vacate may not have significant practical consequences in certain cases. See John V.H. Pierce & David N. Cinotti, *Challenging and Enforcing International Arbitral Awards in New York Courts*, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 357, 396 (James H. Carter & John Fellas eds., 2010).

³⁷ Some courts have taken the view that "manifest disregard" is a non-statutory ground for review which is inconsistent with *Hall Street Associates*. See, e.g., *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418-19 (6th Cir. 2008). Others have concluded that "manifest disregard" refers collectively to the grounds for review in the FAA, and is therefore a "judicial gloss" on the statutory grounds for review which is no longer viable after *Hall Street Associates*. See, e.g., *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-95 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).

³⁸ See, e.g., *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-51 (6th Cir. 1996); *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, No. 09-791 (RBW), 2011 WL 192517, at *8-13 (D.D.C. Jan. 21, 2011). As the United States District Court for the District of Columbia has recently observed:

It should be no surprise, then, that [respondent] DynCorp has failed to cite any case law where the "manifest disregard for the law" standard has been considered an express or implied basis for *denying recognition* of an arbitral award under the New York Convention. Instead, the cases that DynCorp cites . . . all involve arbitral awards that have been rendered in the United States, thereby allowing the non-prevailing parties in those cases to seek *vacatur* of the award under Article V(1)(e) of the Convention.

In addition, Section 12 of the FAA contains other rules governing a notice of a motion to vacate an award. Importantly, Section 12 requires that notice of a motion to vacate an award "must be served upon the adverse party or his attorney within three months after the award is filed or delivered."³⁹

III. INTERPLAY BETWEEN THE NEW YORK CONVENTION AND U.S. DOMESTIC LAW

A. *The Third Circuit's Decision in Ario*

The Third Circuit's recent decision in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*⁴⁰ illustrates the interplay between the principles discussed above as well as the importance of carefully drafting arbitration agreements.⁴¹ The case involved four reinsurance contracts, or "treaties," between two Pennsylvania insurance companies (the "Insurers") and the Underwriting Members of Syndicate 53 at Lloyd's for the 1998 Year of Account (the "Reinsurers"), who were mostly British.⁴² At the time of the lawsuit, the Insurers were in liquidation and represented by Joel Ario, the Insurance Commissioner of the Commonwealth of Pennsylvania as statutory liquidator.⁴³

The arbitration clause provided that "[a]rbitration hereunder shall take place in Philadelphia, Pennsylvania unless both parties otherwise agree. Except as hereinabove provided, the arbitration shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania."⁴⁴ The arbitrators issued an "unreasoned award" rescinding three of the four reinsurance treaties, which did not provide a rationale or identify the

Int'l Trading & Indus. Inv. Co., 2011 WL 192517, at *11.

³⁹ 9 U.S.C. § 12.

⁴⁰ 618 F.3d 277 (3d Cir. 2010).

⁴¹ *See id.* at 288-96.

⁴² *Id.* at 283 & n.2.

⁴³ *Id.* at 283.

⁴⁴ *Id.* at 284.

evidence on which it was based.⁴⁵ The Insurers then filed a motion to confirm in part and vacate in part the award in Pennsylvania state court. The Reinsurers removed the case to federal district court and filed a motion to confirm the award.⁴⁶ The parties agreed that the award was subject to the New York Convention, but they disagreed about the applicability of the FAA and Pennsylvania state law.⁴⁷

Ario argued that the parties had opted out of the FAA entirely by their choice of the rules and procedures established by the Pennsylvania Uniform Arbitration Act (“PUAA”)⁴⁸ to govern the arbitration, and that the federal court thus lacked subject matter jurisdiction.⁴⁹ The district court held that it had jurisdiction over the case because the case related to an arbitration award falling under the Convention.⁵⁰ After the district court denied his motion to remand, Ario argued that his motion to vacate was governed by the standards in PUAA rather than the more stringent vacatur standards in the FAA. The district court concluded that its review was governed by the FAA rather than PUAA, denied the motion to vacate, and confirmed the award.⁵¹

The Third Circuit affirmed, with one dissent, the judgment confirming the award,⁵² holding that (1) parties may not “opt out” of the FAA, but the FAA permits the parties to waive the right of removal as long as they do so in “clear and unambiguous language” (although the court concluded the parties did not do so in this case);⁵³ and (2) that the FAA, rather than the Convention or PUAA, provided the standards for vacatur.⁵⁴

⁴⁵ *Ario*, 618 F.3d at 286.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 42 PA. CONS. STAT. ANN. §§ 7301-7320 (West 2007).

⁴⁹ *Ario*, 618 F.3d at 286.

⁵⁰ *Id.*

⁵¹ *Id.* at 287.

⁵² It reversed, however, the district court's award of sanctions under Federal Rule of Civil Procedure 11 against Ario and his counsel. *Id.* at 283.

⁵³ *Id.* at 288-90.

⁵⁴ *Ario*, 618 F.3d at 290-95.

On the first point, the Third Circuit quoted the Supreme Court's statement that "when 'parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.'"⁵⁵ Thus, it held:

An agreement by parties to apply the rules and procedures of state law operates neither as an "opt out" of the domestic FAA nor as an "opt out" of the Convention's implementing legislation. It is federal law that allows the parties to make and enforce agreements that fall under the FAA or the Convention.⁵⁶

It held that "although *Volt* [and a later Supreme Court decision] addressed only the domestic FAA, the principles undergirding those decisions apply to the Convention's implementing legislation."⁵⁷ However, because of the "'strong and clear preference for a federal forum,'" the Third Circuit applied a "strict standard," requiring "'clear and unambiguous language'" evidencing a waiver of the right to remove.⁵⁸

After concluding that the parties in the case before it did not "clearly and unambiguously" agree to waive the right of removal, the Third Circuit considered whether the FAA "domestic" vacatur standards applied to a "Convention award rendered and enforced in the United States."⁵⁹ It recognized that "if vacatur is limited to the grounds listed in the Convention, *Ario* would have little chance of success."⁶⁰

⁵⁵ *Id.* at 288 (quoting *Volt Info. Scia., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)).

⁵⁶ *Id.* at 289.

⁵⁷ *Id.*

⁵⁸ *Id.* (quoting *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 158 (3d Cir. 2000)).

⁵⁹ *Ario*, 618 F.3d at 290-92.

⁶⁰ *Id.* at 291.

The Third Circuit adopted the reasoning and holding of the Second Circuit in *Yusuf Ahmed Alghanim & Sons Co., W.L.L. v. Toys "R" Us, Inc.*,⁶¹ the seminal case on the issue of the law applicable to a motion to vacate a non-domestic arbitration award rendered in the United States. *Toys "R" Us* has been widely cited for the proposition that a motion to vacate an international or non-domestic arbitral award rendered in the United States is governed by Chapter 1 of the FAA.⁶²

In *Toys "R" Us*, the Second Circuit reasoned: "We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award."⁶³ The Second Circuit summarized the framework of the New York Convention by concluding that the Convention:

mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.⁶⁴

⁶¹ *Yusuf Ahmed Alghanim & Sons Co., W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997) [hereinafter *Toys "R" Us*].

⁶² The *Toys "R" Us* case arose out of a contract between Toys "R" Us and a Kuwaiti company, Yusuf Ahmed Alghanim & Sons Co., W.L.L. ("Alghanim"), to open Toys "R" Us stores around the Middle East. When a dispute arose after Toys "R" Us attempted to terminate the agreement, the parties initiated arbitration under the auspices of the American Arbitration Association. The arbitrator rendered an award in favor of Alghanim. Alghanim petitioned the district court to confirm the award under the New York Convention, and Toys "R" Us cross-moved to vacate or modify the award. *Id.* at 17-18.

⁶³ *Id.* at 21.

⁶⁴ *Id.* at 23.

It drew support from scholarly literature interpreting Article V(1)(e), noting that “[t]here appears to be no dispute among these authorities that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state.”⁶⁵ The court also reasoned from the history of the New York Convention that it was not meant “to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law.”⁶⁶

In *Ario*, the Third Circuit agreed with the Second Circuit that Article V of the Convention specifically contemplates that the country in which the award is made is free to vacate or set aside an arbitral award in accordance with its domestic

⁶⁵ *Id.* at 21; *see also id.* at 22 (“[T]he Convention is not applicable in the action for setting aside the award.” (quoting ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 20 (1981))); *id.* (“[T]he fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made.” (quoting Jan Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT’L L. 211, 242 (1981))); *id.* at 22-23:

[Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.

quoting Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1070 (1961).

⁶⁶ *Toys "R" Us, Inc.*, 126 F.3d at 22. The Second Circuit reaffirmed its holding *Zeiler v. Deutsch*, 500 F.3d 157 (2d Cir. 2007). In *Zeiler*, the court reviewed a district court decision vacating certain arbitration awards and confirming other awards made by the same tribunal. The lower court appeared to have considered only Article V in its decision. On review, the Second Circuit commented on the “double role” of the reviewing court where the court was asked to confirm a non-domestic arbitration award falling under the Convention, as well as serving as an authority under Article V(1)(e) “authorized under Chapter 1 of the FAA to vacate arbitration awards entered in the United States.” *Id.* at 165 n.6. The Second Circuit explained that the district court should not have vacated the awards on the basis of Article V(1)(d) because neither the Convention nor Chapter 2 of the FAA grant the power to vacate non-domestic awards. *Id.* Rather, the lower court should have analyzed the vacatur motion under Section 10 of the FAA. *Id.*

arbitration law.⁶⁷ Because Article V(1)(e) incorporates the domestic FAA with respect to motions to set aside awards, the court concluded that there is no conflict between the Convention and the FAA.⁶⁸

The Third Circuit then turned to the question of whether, under the FAA, the parties could displace the federal vacatur standards with the state law standards in the PUA. As the dissent recognized, the answer to this question was significant. The dissent explained: The FAA standards still rigorously limit judicial intervention, requiring challengers to show the award was “completely irrational,” a near prohibitive burden. Under the PUA by contrast, a court may modify or correct an award that is “contrary to the law.”⁶⁹

The Third Circuit ruled that parties could do so: [T]he domestic FAA allows parties to agree to apply state law enforcement mechanisms in lieu of the FAA default rules. Of course, “[t]he FAA is not the only way into court for parties wanting review of arbitration awards,” and parties “may contemplate enforcement under state statutory or common law.”⁷⁰ It held, however, that in order to displace the “FAA standards [which] control in the absence of contractual intent to contrary[,]”⁷¹ it would “require the parties to express a ‘clear intent’ to apply state law vacatur standards instead of those of the FAA.”⁷²

⁶⁷ *Ario*, 618 F.3d at 292.

⁶⁸ *Id.* at 292.

⁶⁹ *Id.* at 298 (Aldisert, J., dissenting in part) (citations omitted) (citing *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir.1989); 42 Pa. Cons.Stat. Ann. §§ 7301(d)(2) & 7314(a)). The Third Circuit recognized that in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008), the “Supreme Court addressed only the narrow question of whether the parties could agree to modify the FAA’s confirmation, vacatur and modification standards [set forth in 9 U.S.C. §§ 9, 10 and 11], concluding that they ‘provide exclusive regimes for the review provided by statute,’ and thus could not be altered by the parties.” *Id.* at 292 n.11 (majority opinion) (quoting *Hall St. Assocs.*, 522 U.S. at 590). The court in *Ario* held, however, that “*Hall Street* says nothing about using the alternate avenue of 9 U.S.C. § 205 for judicial enforcement of an arbitration award falling under the Convention, and does not support *Ario*’s arguments that the FAA is entirely displaced.” *Id.*

⁷⁰ *Id.* at 292 (second alteration in original) (quoting *Hall St. Assocs.*, 522 U.S. at 590).

⁷¹ *Id.* (quoting *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 296 (3d Cir. 2001)).

⁷² *Ario*, 618 F.3d at 293 (citing *Roadway Package Sys.*, 257 F.3d at 288, 293, 295).

The majority of the court then determined that the arbitration agreement in issue did not evince a “clear intent” to apply the vacatur standards in the PUAAs to the exclusion of the FAA.⁷³ It concluded that while “there is a plausible argument that the parties may have agreed to apply PUAAs standards, it falls short of the ‘clear intent’ we demand.”⁷⁴ It interpreted the arbitration provisions, which stated that the arbitration “shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania,”⁷⁵ “[to be] concerned with only the conduct of the arbitration itself, not judicial enforcement of a resulting award.”⁷⁶ The dissent agreed with the majority’s recitation of the law, but disagreed with the majority’s interpretation of the arbitration agreement, reasoning that the PUAAs’s “rules and procedures” included rules of judicial vacatur.⁷⁷

B. Ario Reflects the Majority View

The holding of the Third Circuit in *Ario* and the Second Circuit in *Toys “R” Us* that a motion to vacate an international award rendered in the United States is governed by the domestic standards for vacatur set forth in Chapter 1 of the FAA reflects the majority view.

The Sixth Circuit likewise decided in *Jacada (Europe) Ltd. v. International Marketing Strategies, Inc. (Europe)*⁷⁸ that the FAA grounds for domestic vacatur development company from the United Kingdom and a marketing firm from Michigan. After arbitration in Michigan under the auspices of the American Arbitration Association, the tribunal issued an award in which it expressly disregarded a limitation on liability provision in the contract and issued

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 284.

⁷⁶ *Id.* at 294.

⁷⁷ *Ario*, 618 F.3d at 299 (Aldisert, J., dissenting in part).

⁷⁸ 401 F.3d 701 (6th Cir. 2005).

an award in favor of IMS.⁷⁹ Jacada filed a petition to vacate the award in state court, and a few hours later IMS filed a petition to confirm the award in federal court.⁸⁰ The federal case was stayed, and the state case was transferred and then removed to federal district court.⁸¹

The federal district court ruled that the Convention was applicable to the dispute and therefore that the action was properly removed, a decision upheld by the Sixth Circuit.⁸² The court then addressed Jacada's petition to vacate the award. It began its analysis with the language of Article V(1)(e) and held that "[b]ecause this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award."⁸³

The Sixth Circuit distinguished its prior holding in *M & C Corp. v. Erwin Behr GmbH & Co., KG*,⁸⁴ which "held that a party seeking to vacate an arbitral award was limited to raising the exclusive grounds found in Article V of the Convention because the FAA does not apply to cases under the Convention if the FAA is 'in conflict' with the Convention or its implementing legislation."⁸⁵ The court distinguished this holding on the grounds that *M & C* dealt with an award that had been rendered in the United Kingdom. In *Jacada*, the award was rendered in the United States and Article V(1)(e) therefore authorized the application of domestic law.⁸⁶

Other circuits have stated in dicta that motions to vacate international arbitral awards are reviewed under the FAA vacatur standards, rather than under the grounds in Article V of the New York Convention for denying enforcement of

⁷⁹ *Id.* at 703-04.

⁸⁰ *Id.* at 704.

⁸¹ *Id.*

⁸² *Id.* at 704-09.

⁸³ *Id.* at 709.

⁸⁴ 87 F.3d 844 (6th Cir. 1996).

⁸⁵ 401 F.3d at 709 n.8.

⁸⁶ *Id.* The court also addressed whether the parties had agreed to "opt out" of the FAA in favor of Michigan's law, which provided a "more thorough standard of review," and concluded that the "generic choice-of-law provision" in the contract was insufficient to opt out of the federal vacatur standard of review. *Id.* at 710.

an award. For example, the Seventh Circuit noted in passing in *Lander Co. v. MMP Investments, Inc.* that the New York Convention "contemplates the possibility of the award's being set aside in a proceeding under local law."⁸⁷

The Fifth Circuit Court addressed the interaction of the New York Convention and the FAA in greater detail in the *Gulf Petro Trading Co.* case.⁸⁸ That case involved a dispute over a joint venture between Nigerian National Petroleum Corporation (NNPC), owned by the government of Nigeria, and Petrec, a division of a U.S. company.⁸⁹ The arbitral tribunal rendered two decisions: a "Partial Award" finding that Petrec had standing to submit its claims and that NNPC had not fulfilled its obligation under the joint venture agreement, and a "Final Award," finding that Petrec in fact did not have standing to sustain its claims against NNPC.⁹⁰ Petrec made an application before the Swiss Federal Court to set aside the Final Award, but the Swiss court confirmed the award.⁹¹ Petrec then filed a claim in the Northern District of Texas to enforce the Partial Award and set aside or modify the Final Award. The district court determined that by seeking to enforce the Partial Award, Petrec was really seeking to annul the Final Award, because the findings of the Partial Award had been essentially vacated by the arbitral tribunal in the Final Award. Because the New York Convention does not authorize secondary jurisdictions – i.e., jurisdictions other than the jurisdiction where the award was made – to vacate or annul awards, the district court held that it was precluded from granting the relief sought by Petrec.⁹² The district court held that "United States federal courts cannot set aside or modify an arbitral award

⁸⁷ 107 F.3d 476, 478 (7th Cir. 1997).

⁸⁸ *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742 (5th Cir. 2008); *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 288 F. Supp. 2d 783 (N.D. Tex. 2003), *aff'd*, 115 F. App'x 201 (5th Cir. 2004).

⁸⁹ *Gulf Petro Trading Co.*, 512 F.3d at 744.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Gulf Petro Trading Co.*, 288 F. Supp. 2d at 792.

made in another nation," and therefore do not have subject matter jurisdiction over such claims.⁹³

After the Fifth Circuit upheld the district court's determination that it could not set aside or modify the Final Award because it had only secondary jurisdiction, Petrec filed suit in the Eastern District of Texas, claiming that the arbitral award was the result of bribery and fraud,⁹⁴ and asserting statutory claims under the U.S. Racketeer Influenced and Corrupt Organizations Act (RICO) and the Texas Deceptive Trade Practices Consumer Protection Act, and common law claims for fraud and civil conspiracy.⁹⁵ The district court determined, and the Fifth Circuit agreed, that all of Gulf Petro's claims in this second lawsuit constituted a collateral attack on the Final Award, because the harm that Gulf Petro suffered was a result of the arbitral award against it, not the alleged bribery itself.⁹⁶ Because a "court sitting in secondary jurisdiction lacks subject matter jurisdiction over claims seeking to vacate, set aside, or modify a foreign arbitral award," the Fifth Circuit dismissed all of Gulf Petro's claims.⁹⁷

Finally, the D.C. Circuit held in *TermoRio S.A. E.S.P. v. Electranta S.P.* that "[u]nder the [New York] Convention, the power and authority of the local courts of the rendering state remain of paramount importance."⁹⁸ It noted that the New York Convention did not ""provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.""⁹⁹

⁹³ *Id.*

⁹⁴ *Gulf Petro Trading Co.*, 512 F.3d at 745.

⁹⁵ *Id.* at 749.

⁹⁶ *Id.* at 750.

⁹⁷ *Id.* at 747.

⁹⁸ *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 939 (D.C. Cir. 2007) (quoting *Alghanim*, 126 F.3d at 22).

⁹⁹ *Id.* (quoting *Alghanim*, 126 F.3d at 22).

C. *The Eleventh Circuit's Contrary View*

The Eleventh Circuit has taken a different approach than the cases discussed above. In *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*,¹⁰⁰ it considered an appeal from a denial of a motion to vacate the arbitral award made in the United States that it concluded was a non-domestic award governed by the Convention because one of the parties was a non-U.S. party.¹⁰¹

The court then addressed the appellant's three theories for why the award should be vacated, and used the terminology for *vacating* an award and *denying enforcement* of an award interchangeably. Although the appeal was of the denial of a motion to *vacate* an award, the court began its analysis by stating: "The Tampa panel's arbitral award *must be confirmed* unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention."¹⁰²

The Eleventh Circuit declined to vacate the arbitral award because the ground advanced by the party seeking vacatur was not contained in Article V of the Convention.¹⁰³ The court analyzed the distinction between the regime governing vacatur of domestic arbitration awards and non-domestic awards. It concluded that the reasons for vacatur of domestic awards included the four grounds enumerated in the FAA and two non-statutory defenses against enforcement, namely that an award is "arbitrary and capricious" or enforcement would be against public policy.¹⁰⁴ The court contrasted this regime for vacatur with the defenses against enforcement of an award contained in the Convention, and quoted the Second Circuit's opinion in *Toys "R" Us* for the proposition that the grounds to deny enforcement of an award "enumerated in Article V of the

¹⁰⁰ *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

¹⁰¹ *Id.* at 1441.

¹⁰² *Id.* (emphasis added).

¹⁰³ *Id.* at 1445.

¹⁰⁴ *Id.* at 1445-46.

Convention are the only grounds available for setting aside an arbitral award."¹⁰⁵ It held that "the Convention's enumeration of defenses is exclusive," and that Chapter 1 of the FAA was inapplicable to a motion to vacate an arbitral award that falls under the New York Convention.¹⁰⁶

A district court within the Eleventh Circuit has noted that *Industrial Risk Insurers* and *Toys "R" Us* appear to be at odds with each other.¹⁰⁷ The court noted that *Toys "R" Us* recognized "that grounds other than those set forth in the New York Convention may apply to a motion to set aside or vacate a foreign arbitral award rendered in the United States," but declined to rely on *Toys "R" Us* because it was "not binding law . . . and appears to be contrary to [*Industrial Risk Insurers*]." ¹⁰⁸

Another federal district court sitting in Virginia similarly held, in *RZS Holdings AVV v. PDVSA Petroleos S.A.*,¹⁰⁹ that Chapter 1 of the FAA does not apply to international awards rendered in the United States. The court was presented with a petition to vacate an award on the basis that one or both parties had received a draft of the award prior to its publication, one of the arbitrators attended a conference with an attorney from the prevailing party, and the prevailing party paid the entire cost of the arbitration.¹¹⁰ The court denied the petition because none of the grounds presented in support of the petition were contained in Article V of the Panama Convention, which is nearly identical to Article V of the New York Convention.¹¹¹ It held that there was a conflict between Chapter 1 and Chapter 3 of the FAA, which implements the Panama Convention, based upon its "reading of the language of 9 U.S.C. § 207 that indicates that the

¹⁰⁵ *Id.* at 1446 (quoting *Toys "R" Us*, 126 F.3d at 20).

¹⁰⁶ *Id.*

¹⁰⁷ See *Nicor Int'l Corp. v. El Paso Corp.*, 318 F. Supp. 2d 1160, 1168 n.7 (S.D. Fla. 2004).

¹⁰⁸ *Id.*

¹⁰⁹ *RZS Holdings AVV v. PDVSA Petroleos S.A.*, 598 F. Supp. 2d 762 (E.D. Va. 2009), *aff'd*, 383 F. App'x 281 (4th Cir. 2010).

¹¹⁰ *Id.* at 768.

¹¹¹ *Id.* at 767.

reasons enumerated in Article V of the [Panama] Convention provide the exclusive list of grounds to vacate international arbitration awards."¹¹²

D. Practical Considerations in Seeking To Vacate an Award: The Timing Trap

The FAA contains a strict three-month deadline for parties to move to vacate arbitral awards: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."¹¹³ If Chapter 1 of the FAA applies to awards covered by the New York Convention, then this limitations period likewise applies.¹¹⁴ Many state statutes also have very short deadlines for seeking vacatur.¹¹⁵ This is in contrast to the three years permitted under the Convention for a party to seek confirmation of an award.¹¹⁶

If a party does not move to vacate an award within the three-month time frame, it cannot seek to do so later when faced with a motion to confirm the award.¹¹⁷ Accordingly, a party who intends to seek to vacate an international award rendered in the United States must move quickly and may not wait until the prevailing party seeks confirmation of the award.

If a party chooses not to vacate or misses the deadline, then its only option is to wait for the opposing party to attempt to confirm or enforce that award under the New York Convention, and attempt to resist confirmation or enforcement. As discussed above, however, under the New York Convention, a court must confirm

¹¹² *Id.* at 766-67.

¹¹³ 9 U.S.C. § 12.

¹¹⁴ *See* Republic of Arg. v. BG Group PLC, 715 F. Supp. 2d 108, 120 n.10 (D.D.C. 2010).

¹¹⁵ *See, e.g.*, 42 PA. CONS. STAT. ANN. § 7314(b) (2007) (30 days); FLA. STAT. § 682.13(2) (2003) (90 days); N.Y. C.P.L.R. § 7511(a) (McKinney Supp. 2011) (90 days).

¹¹⁶ 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.").

¹¹⁷ *See* Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 478 (7th Cir. 1997); *see also* Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986); Florasynth v. Pickholz, 750 F.2d 171, 174-77 (2d Cir. 1984).

the award unless the party opposing confirmation proves "one of the grounds for refusal or denial of recognition or enforcement of the award specified" in the New York Convention exists.¹¹⁸ If a party does not move to vacate an award within the three-month time limit, then it would only have available the Article V grounds to resist enforcement of the award, not the Chapter 1 grounds under the FAA to vacate the award.

Moreover, it is not necessary for a party to confirm the award in the United States before seeking to enforce the award elsewhere.¹¹⁹ As the Second Circuit has explained: "While the distinction between vacation of an arbitration award and refusal to confirm an award may be of negligible significance within the United States, it can affect the remaining force of an unconfirmed award outside this country, if a party seeks to confirm and enforce the award under the Convention abroad."¹²⁰

IV. CONCLUSION

Parties choosing the United States as the place of their international commercial arbitrations need to understand the interplay between the Convention, the FAA and state law and to consider the issues discussed above both at the time they draft their arbitration agreements and after an award is entered. Parties who are not aware of these issues may lose their opportunity to have an award entered against them vacated based on grounds in the FAA, or on more lenient state law grounds, which may not be available under the New York Convention.

¹¹⁸ See 9 U.S.C. § 207.

¹¹⁹ See, e.g., *Oriental Commercial & Shipping Co., (U.K.), Ltd. v. Rosseel, N.V.*, 769 F. Supp. 514, 516-17 (S.D.N.Y. 1991). In *Oriental Commercial*, the court noted that parties obtaining an international arbitral award in the United States have two options. They can seek to have the award confirmed by a U.S. court and enforce it elsewhere as a foreign judgment. Alternatively, they can go directly to a court outside of the United States and seek enforcement of the award under the New York Convention. *Id.*

¹²⁰ *Zeiler v. Deitsch*, 500 F.3d 157, 165 n.6 (2d Cir. 2007).