International Arbitration:

The Role of the Federal Courts and Strong Support From the Eleventh Circuit

ANDREW J. TUCK, KRISTEN BROMBEREK, AND JAMIE GEORGE

Over the past decade, international arbitration has grown dramatically as a means of resolving commercial disputes.[1] International arbitration provides an attractive option for parties conducting business in the global market—providing certainty and predictability in jurisdiction, choice of law, and confidentiality, while avoiding national-court bias. International arbitration can also streamline proceedings with more limited discovery and shorter calendars, potentially reducing costs.

But these benefits can only be realized when national courts and national laws stand ready to recognize and support the parties' decision to resolve disputes through binding international arbitration. National courts may be required to intervene and assist in all phases of arbitration, from interpreting and enforcing the parties' agreement to arbitrate, supporting ongoing arbitral proceedings through enforceable court orders, and ultimately ensuring the arbitral award has the force and effect of a judgment. Accordingly, in the United States, federal courts play a key role in supporting international arbitration and its continued success and growth as a means of dispute resolution.

Atlanta has become a center for global commerce in the modern economy, making it an attractive place for international companies to do business. Metro Atlanta is the home of more than 16 multinational, Fortune 500 companies, second only to New York and Houston in the number of global companies headquartered in the city.[2] As Atlanta's economy has grown, so has the body of case law in the Eleventh Circuit and Georgia federal district courts addressing international arbitration issues. The Eleventh Circuit now has well-developed precedent supporting international arbitration at all stages, making it among the most favorable jurisdictions in the world for parties who wish to arbitrate.[3]

Supporting International Arbitration: The Role of Federal Courts

International Arbitration Under the New York Convention

As courts consistently recognize, public policy in the United States favors arbitration, both in domestic and international disputes. While domestic arbitrations are governed by Chapter 1 of the Federal Arbitration Act (FAA),[4] international arbitrations are governed by Chapter 2 of the FAA,[5] which incorporates the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (more frequently known as the "New York Convention")—almost universally considered the foundational instrument for international arbitration. Over 150 other countries across the globe have also ratified or acceded to the New York Convention. By becoming a member state, nations adopting the New York Convention agree to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting

states. As the U.S. Supreme Court described, "the goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts."[6]

Under the New York Convention, courts are required to compel arbitration where a valid and enforceable arbitration agreement exists,[7] and to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory," except in limited, specifically enumerated circumstances.[8] In the United States, federal district courts have original subject matter jurisdiction over any suit arising out of the New York Convention, regardless of the amount in controversy.[9] Venue lies in any court that would otherwise have jurisdiction over the parties.[10]

Under this framework, there are many ways in which issues of international arbitration could arise in U.S. federal courts. For example, a foreign entity could bring a breach of contract claim in federal district court against an American company, asserting diversity jurisdiction. However, if the contract included an arbitration provision, the defendant could move to compel, implicating the New York Convention and the FAA's 9 U.S.C. § 201. Similarly, an entity could bring a case under the New York Convention to enforce and collect on an arbitral award, filing a federal district court action in a jurisdiction where the losing party is located, or where it holds collectable assets. But perhaps most importantly, federal courts will be faced with issues of international arbitration when the parties select a local city as the seat of the arbitration—the legal "home" of the arbitration proceedings.

Choice of Law in International Arbitration

A single international arbitration may implicate various jurisdictions' substantive and procedural laws. For instance, the parties may select the substantive law in their underlying contract—for example, the parties may agree in a patent license that the contract will be governed by the laws of New York. In that case, an arbitrator would look to New York contract law when considering issues such as contract interpretation, the standard for substantial performance, or the bounds of the duty of good faith and fair dealing.

In addition to selecting the substantive law that may govern the agreement itself, parties agreeing to arbitrate a dispute may also select the procedural rules under which they will arbitrate. The parties may select a particular institution to administer the arbitration, such as the International Chamber of Commerce International Court of Arbitration, London Court of International Arbitration, Hong Kong International Arbitration Center, International Centre for Settlement of Investment Disputes, or JAMS. Each of these institutions has established rules governing the administration of international arbitration proceedings, addressing issues such as the selection and appointment of arbitrators, joinder of parties to the arbitration, consolidation of arbitral actions, procedures for the taking or presentation of evidence, and the procedure and timing for issuing a final award.

While the substantive law and administrative rules will undoubtedly impact an arbitration, perhaps most significant is the parties' decision regarding the seat of the arbitration. By selecting a particular city as the seat of the arbitration, the parties agree that it will serve as the "legal or judicial home," the "forum," or the "base" of the arbitration. The seat is where an arbitration is legally "domiciled," and becomes the place where the award is "made" under the New York Convention.[11] The agreed-on arbitral seat is of fundamental and critical importance—among other reasons, because in order to be effective, an arbitral award must comply with any and all requirements imposed by the law of the seat.[12]

When the parties select a particular city as the seat of an international arbitration, specific personal jurisdiction will exist in the district court encompassing the seat, even if one or more parties to the arbitration would not otherwise be subject to personal jurisdiction in that location. By consenting to arbitrate in a particular city, the parties will likely be found to consent to jurisdiction over any petition relating to those arbitral proceedings.[13]

Accordingly, parties will often, if not most commonly, turn to the national courts of the seat of the arbitration when seeking orders in aid of arbitration, such as orders to compel arbitration, requests for discovery, and most significantly, for enforcement and annulment proceedings. In each of these areas, the Eleventh Circuit has expressed clear support for international arbitration and the parties' desires to obtain a valid and enforceable arbitral award.

The Eleventh Circuit's Pro-Arbitration Case Law

The Eleventh Circuit has embraced arbitration as a "meaningful alternative to litigation," rather than "the first stop along the way" of protracted legal proceedings.[14] To "keep the promise of arbitration," Eleventh Circuit courts have developed a robust body of case law that both respects the parties' initial commitments regarding arbitration and recognizes and reinforces the power of arbitrators to conduct proceedings and render a final award, with minimal involvement from the courts. More specifically, the Eleventh Circuit: (1) liberally enforces parties' agreements to arbitrate, while vesting arbitrators with the power to determine their own jurisdiction and limiting the grounds on which a party may challenge a motion to compel arbitration; (2) upholds agreements to restrict discovery, on the one hand, while allowing parties to rely on 28 U.S.C. § 1782 to compel the production of requested documents for use in the arbitration, on the other; and (3) enforces arbitration awards in all but the most unusual cases. As a result, parties who decide to arbitrate within the Eleventh Circuit can rest assured that—absent exceptional circumstances—courts will uphold the parties' *ex ante* agreement to arbitrate and the tribunal's final arbitration award, rather than allowing parties to "snatch court victories from the jaws of arbitration defeats."[15]

Enforcing the Parties' Decision to Arbitrate

The Eleventh Circuit strongly defers to parties' decisions to arbitrate disputes. In keeping with the "strong presumption in favor of arbitration of international commercial suits," courts in the Eleventh Circuit engage in a "very limited inquiry" when deciding a motion to compel arbitration under the implementing legislation of the New York Convention.[16] Courts will grant a motion to compel arbitration so long as: (1) the four basic jurisdictional prerequisites of the Convention are met[17] and (2) none of the Convention's Article II affirmative defenses apply.[18] These Article II defenses derive from the Convention's pronouncement that a court shall refer the parties to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The Eleventh Circuit has provided significant clarity as to those defenses that qualify as affirmative defenses to a motion to compel arbitration and has interpreted Article II narrowly, in favor of the

party moving to compel arbitration. First, the court explained that Article II's "null and void" clause "limits the bases upon which an international arbitration agreement may be challenged to standard breach-of-contract defenses," specifically "only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale."[19] Accordingly, the Eleventh Circuit has generally foreclosed affirmative defenses that cannot be universally applied, such as unconscionability.[20] Second, unlike other jurisdictions, the Eleventh Circuit made it explicitly clear that a party may not assert Article V defenses, which are broader and include such defenses as unconscionability and violation of public policy, at the motion to compel stage.[21] Therefore, parties may *only* rely on standard, universally applicable contract-nullification defenses—such as fraud, mistake, duress, and waiver—in response to a motion to compel.

Eleventh Circuit courts also favor broad enforcement of international agreements—even if those agreements appear to conflict with domestic law—further tilting the scale in favor of a party moving to compel pursuant to an international arbitration clause. For example, in *Lipcon v. Underwriters at Lloyd's, London*,[22] the Eleventh Circuit acknowledged that there was "strong support in the plain language of the anti-waiver provisions [of the 1933 Securities Act], which facially admit of no exceptions," for holding that international choice-of-law clauses in securities agreements are unenforceable.[23] However, the court turned to "precedent and policy considerations" in determining that choice-of-law clauses purporting to apply foreign law in a domestic securities agreement were nevertheless presumptively enforceable.[24]

The U.S. District Court for the Northern District of Georgia expressly applied the *Lipcon* holding to an international arbitration agreement. In *Goshawk Dedicated v. Portsmouth Settlement Co. I*,[25] the plaintiff moved to compel arbitration. In response, the defendant argued that, even assuming an arbitration agreement existed, the agreement was unenforceable under a Georgia statute (applied through the federal McCarran-Ferguson Act), which rendered arbitration clauses in insurance contracts void as against public policy. The court ultimately concluded that the New York Convention superseded the McCarran-Ferguson Act, warranting enforcement of the agreement at issue. In reaching this decision, the court cited *Lipcon* for the propositions: (1) that "the Eleventh Circuit … has also emphasized the policy of enforcing international agreements despite an asserted tension with domestic law" and (2) that "the court consistently has treated 'truly international agreements' different than domestic transactions."[26]

Finally, the Eleventh Circuit has taken a fairly liberal approach in allowing arbitrators to decide the arbitrability of matters before them (a principle also known as "competence-competence," referring to arbitrators' competence to determine their own competence), as long as the parties have chosen arbitral rules providing for competence-competence. The question of arbitrability is ordinarily an issue for judicial determination unless the parties "clearly and unmistakably provide otherwise." However, the Eleventh Circuit has held that parties "clearly and unmistakably provide otherwise" if they incorporate arbitral rules providing for competence-competence into their contract.[27] Georgia's International Commercial Arbitration (ICA) Code provides further support for allowing arbitrators to decide whether an arbitration clause applies to a given dispute. The ICA code, which applies to all international commercial arbitrations in Georgia,[28] states that "unless otherwise agreed by the parties … the arbitration tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[29]

In sum, the Eleventh Circuit strongly favors enforcement of the parties' agreement to arbitrate without major judicial involvement, having: (1) narrowly interpreted the defenses available to a motion to compel; (2) announced a policy of broadly enforcing international agreements, even if those same agreements would not be enforceable as domestic agreements; and (3) allowed arbitrators to determine their own competence as long as the arbitral rules selected so provide.

Procedural and Discovery Issues

Eleventh Circuit decisions in the discovery context are likewise aligned with the presumption favoring arbitration of international commercial suits. First, the Eleventh Circuit has indicated that parties to an arbitration may *ex ante* restrict discovery and need not comply with all of the procedural requirements of litigation—important concessions given that many parties pursue arbitration in the first place to ensure simplicity and expediency and avoid the attendant costs of discovery in federal court. Second—somewhat conversely—courts in the Eleventh Circuit may also allow parties who can show good cause to turn back to the court and request an order to compel discovery under 28 U.S.C. § 1782, which provides discovery assistance to litigants before foreign and international tribunals. Accordingly, courts within the Eleventh Circuit respect parties' mutual agreement to restrict discovery when so agreed, but may also provide assistance in compelling discovery where sufficient justification exists.

First, the Eleventh Circuit has held that an arbitration clause that limited discovery by allowing the parties to take depositions only if authorized by the arbitrator was not unconscionable.[30] The court based its holding on a prior case in which the Supreme Court explained that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition.'"[31] Of course, these are the characteristics that make arbitration an attractive vehicle for the resolution of certain claims in the first place. The Eleventh Circuit has also held that arbitration proceedings "need not follow all the 'niceties' of the federal courts; [they] need provide only a fundamentally fair hearing.... Arbitration proceedings are not constrained by formal rules of procedure or evidence."[32]

Second, several courts within the Eleventh Circuit have found that parties may petition the court for an order compelling discovery pursuant to 28 U.S.C. § 1782, which authorizes a federal district court to provide assistance obtaining discovery to "foreign and international tribunals and to litigants before such tribunals." In *In re Roz Trading Ltd.*,[33] the U.S. District Court for the Northern District of Georgia concluded that an international commercial arbitral body located in Austria was a "foreign or international tribunal" within the meaning of § 1782(a).[34] Accordingly, the court exercised its discretion to compel the respondent to produce certain documents for use in arbitration proceedings between petitioner, respondent, and others. Similarly, the U.S. District Court for the Southern District of Florida held that 28 U.S.C. § 1782 applied to the foreign private international arbitration at issue in *Ex rel Application of Winning (HK) Shipping Co. Ltd.*[35] The Eleventh Circuit actually once ruled that an arbitration

in Ecuador was a "proceeding in a foreign or international tribunal" under § 1782,[36] but that opinion was later vacated and superseded without the court reaching that particular question again.[37]

Accordingly, courts within the Eleventh Circuit have demonstrated a pro-arbitration stance through several discovery decisions. Courts will likely allow the parties to *ex ante* limit or restrict discovery when they so desire to achieve efficiency and simplicity in arbitral proceedings. On the other hand, courts may also allow a party to seek recourse from the court for aid in obtaining discovery when stonewalled by the other party in the course of an arbitration.

Enforcement of an Arbitral Award

Most notably, the Eleventh Circuit has developed an exceptionally strong body of case law for enforcing arbitral awards. Unlike other circuits, the Eleventh Circuit has eliminated domestic arbitration law as a basis for vacatur, instead relying only on the seven grounds set forth in the New York Convention. Further, the Eleventh Circuit has demonstrated a willingness to sanction frivolous challenges of arbitration awards. Accordingly, Eleventh Circuit precedent discourages protracted post-award litigation (i.e., "snatch[ing] court victories from the jaws of arbitration defeats"), promoting predictability, finality, and cost-savings.

The Eleventh Circuit only recognizes seven grounds for setting aside or vacating an international arbitration award rendered in the United States[38]—the grounds listed in the New York Convention and adopted in Chapter 2 of the FAA.[39] Other circuits, notably the Second Circuit, also recognize domestic law as a basis for vacating an international arbitration award rendered in the United States, "read[ing] 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 [the case of an award made in the United States] the FAA, to a motion to set aside or vacate that arbitral award."[40]

Further, many circuits (again including the Second Circuit), have accepted the non-statutory "manifest disregard of the law" ground for vacatur—a ground rooted in the Supreme Court's dicta in *Wilko v. Swan*.[41] The Eleventh Circuit has expressly foreclosed the possibility of setting aside an award on the basis of manifest disregard of the law.[42] The Eleventh Circuit's rejection of the "manifest disregard" standard is significant even though "manifest disregard" challenges are rarely successful,[43] because "unless and until [such a challenge] is definitively interred it remains an issue that can be, and predictably will be, raised in post-award efforts by the losing party to reverse the result of the arbitration, or at least to postpone enforcement of it. This of course adds to the cost of arbitration in the United States, as well as delaying the result of it, perhaps for several years, even if the challenge to the award is ultimately rebuffed."[44]

In addition to limiting challenges to the enforceability of international arbitration awards, the Eleventh Circuit has demonstrated a willingness to sanction frivolous challenges of arbitration awards.[45] The threat of sanctions, combined with the narrow vacatur grounds recognized by courts in the Eleventh Circuit, helps ensure that parties do not engage in protracted re-litigation of issues already arbitrated.

Conclusion

As international arbitration continues to grow as a means for resolving commercial disputes, litigants will increasingly scrutinize various aspects of forum law to decide whether a particular forum is suitable to resolve their dispute. Not only is Atlanta a logistically convenient forum for such arbitrations, its regional federal court, the Eleventh Circuit, has developed a body of case law supporting international arbitration at all stages, making it among the most favorable jurisdictions in the world for parties who wish to arbitrate. ⊙



Andrew J. Tuck is a partner, Kristen Bromberek is a senior associate, and Jamie George is an associate in the Atlanta office of Alston & Bird LLP.

Endnotes

[1]For example, between 2005 and 2015, the International Chamber of Commerce International Court of Arbitration (ICC) saw a 53 percent increase in the number of arbitrations initiated with the ICC court annually, with similar growth in the number of awards issued. *See* International Chamber of Commerce, ICC Arbitration Statistics, *available at* perma.cc/D69Q-GVKJ (last visited Nov. 8, 2016).

[2]*See, e.g., Metro Atlanta Fortune 500 & Fortune 1000 Headquarters (2016)*, Metro Atlanta Chamber (Jan. 1, 2017), *available at* https://www.metroatlantachamber.com/assets/2017_fortune_500_and_1000_companies_RJQmBxq.pdf. Atlanta is also home to four Fortune Global 500 companies: Coca-Cola, Delta Airlines, United Parcel Service, and Home Depot.

[3]Further, Georgia State University College of Law, in downtown Atlanta, recently opened the Atlanta Center for International Arbitration and Mediation. *See* Atlanta Center for International Arbitration and Mediation, http://law.gsu.edu/centers/international-arbitration-center (last visited May 11, 2017).

[4]Federal Arbitration Act, 9 U.S.C. §§ 1-16.

[5]*Id.,* at §§ 201-208.

[6]*Scherk v. Alberto-Culver*, 417 U.S. 506, 520 n.15 (1973). The Court also noted the goal to "unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries." *Id.*

[7]United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(3) (New York, June 10, 1958) ("The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that said agreement is null and void, inoperative or incapable of being performed.") (hereinafter New York Convention).

[8]*Id.,* at arts. III, V.

[9]9 U.S.C. § 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in § 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.").

[10]*Id.,* ("An action or proceeding over which the district courts have jurisdiction pursuant to § 203 of this title may be brought in any such court in which save for the arbitration agreement an action

or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.").

[11]The seat of the arbitration may, but need not, be the same as the situs of the arbitration—the physical location in which the parties agree to hold any hearings or conferences. For example, parties may select London or New York as the seat of the arbitration, but still choose to hold hearings in Atlanta. *See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291-92 (5th Cir. 2004) ("In selecting Switzerland as the site of the arbitration, the parties were not choosing a physical place for the arbitration to occur, but rather the place where the award would be 'made.' … The arbitration proceeding in this case physically occurred in Paris, but the award was 'made in' Geneva, the place of the arbitration in the legal sense.").

[12]While a petition to enforce an international arbitral award may be brought in the national courts of any signatory to the New York Convention, a petition to vacate an international award must be brought at the arbitral seat and under that country's national laws. Gary Born, *International Commercial Arbitration* § 11.03[A] (explaining that the seat is the "exclusive annulment forum with plenary annulment authority" of an arbitral award).

[13]*See, e.g.*, *Fireman's Fund Ins. Co. v. Nat'l Bank of Cooperatives*, 103 F.3d 888, 894 (9th Cir. 1996) ("By agreeing to arbitration in San Francisco, Aldus indicated its willingness to resolve disputes in California."); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999) ("It is well-settled that federal courts applying New York law have personal jurisdiction over parties that agree to arbitrate their disputes in New York."); *Mitchell v. Fairfield Nursing & Rehab. Ctr.*, LLC, No. 2:15-CV-00188-MHH, 2016 WL 1365586, at *4 (N.D. Ala. Apr. 6, 2016) ("In evaluating personal jurisdiction, courts have found that a forum selection clause in an arbitration agreement may give rise to personal jurisdiction over a defendant.").

[14]*Wiregrass Metal Trades Council AFL–CIO v. Shaw Envtl. & Infrastructure Inc.*, 837 F.3d 1083, 1092 (11th Cir. 2016) (lamenting that too often parties "try[] to convert arbitration losses into court victories").

[15]*Id.* at 1093.

[16]*Bautista v. Star Cruises*, 396 F.3d 1289, 1294-95 (11th Cir. 2005) (quoting *Francisco v. Stolt Achievement Mt.*, 293 F.3d 270, 273 (5th Cir. 2002), and *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir.1998)).

[17]The New York Convention's jurisdictional prerequisites are: "(1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states." *Id.* at 1294 n.7.

[18]*Singh v. Carnival Corp.*, 550 F. App'x 683, 685 (11th Cir. 2013).

[19]*Bautista*, 396 F.3d at 1302.

[20]*Id.* ("It is doubtful that there exists a precise, universal definition of the unequal bargaining power defense that may be applied effectively across the range of countries that are parties to the Convention, and absent any indication to the contrary, we decline to formulate one."); *Singh*, 550 F. App'x at 685 (finding that the district court had properly held that *Bautista* "forecloses the argument that Article II includes an affirmative defense based upon unconscionability").

[21]*Compare Singh*, 550 F. App'x at 685 n.5 ("A party may raise Article V defenses [such as violation of public policy] only at the post-arbitration enforcement stage of proceedings."), *with Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro*, 712 F.2d 50, 53 (3d Cir. 1983) (concluding that Article II's "null and void" clause also includes contravention of fundamental policies of the forum state, so that a party could assert violation of public policy as a defense to a motion to compel, rather than only as a defense to enforcement of an award).

[22]*Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998).

[23]*Id.*, at 1292.

[24]*Id.*

[25]*Goshawk Dedicated v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293 (N.D. Ga. 2006).

[26]*Id.*, at 1309.

[27]*See, e.g.*, *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014). This holds true whether the arbitration is domestic or international. *See Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) (reaching same conclusion and citing for support First Circuit case in which parties incorporated ICC Rules which "clearly and unmistakably allow the arbitrator to determine her own jurisdiction").

[28]O.C.G.A. § 9-9-21(a). The ICA code was intended to be applied in

addition to the Federal Arbitration Act (FAA), which "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis. v. Bd. of Trustees*, 489 U.S. 468, 477 (1989).

[29]O.C.G.A. § 9-9-37.

[30]*Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005). Although this case involved a domestic arbitration, there is no indication that the court would have reached a contrary decision if the arbitration at issue was an international arbitration instead (although, as explained above, the unconscionability of an international arbitration agreement generally cannot be challenged at the motion to compel stage in the Eleventh Circuit).

[31]*Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 31 (1991)).

[32]*Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1443 (11th Cir. 1998) (citations omitted) (finding appellee's production of expert report shortly before commencement of arbitration proceedings and arbitral panel's admission of the report did not warrant vacatur of award because panel had adhered to the parties' agreement incorporating the flexible AAA rules).

[33]*In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

[34]*Id.,* at 1226.

[35]*Ex rel Application of Winning (HK) Shipping Co.* No. 09-22659-MC, 2010 WL 1796579 (S.D. Fla. Apr. 30, 2010). However, the court did conclude that the Supreme Court's holding in *Intel Corp. v. Advanced Micro Devices,* 542 U.S. 241 (2004)—which the *In re Roz Trading* court had interpreted and relied on—did "not *necessarily* extend the reach of section 1782 to purely private arbitrations." *Id.* at *7. The court then "examine[d] the particular proceeding at issue in the case at bar, using the guidance provided by *Intel*." *Id.* Additionally, on another occasion, the U.S. District Court for the District of Southern Florida held that an ICC tribunal was *not* a foreign or international tribunal under § 1782. *In re Operadora DB Mexico, S.A. de C.V.*, No. 609-CV-383-ORL-22GJK, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009).

[36]*See In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA) Inc.*, 685 F.3d 987, 994 (11th Cir. 2012).

[37]*See Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA) Inc.*, 747 F.3d 1262 (11th Cir. 2014) ("We decline to answer this substantial question on the sparse record found in this case. The district court made no factual findings about the arbitration and made no effort to determine whether the arbitration proceeding in Ecuador amounted to a § 1782 tribunal.").

[38]Those grounds include: (1) the parties to the arbitration agreement were under some incapacity or the agreement is not valid; (2) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or could not otherwise present its case; (3) the award deals with a difference not contemplated by the terms of the submission to arbitration or contains decisions on matters beyond the scope of the arbitration; (4) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties; (5) the award is not yet binding on the parties or has been set aside or suspended by a competent authority of the country in which it was rendered; (6) the subject matter of the proceedings is not capable of settlement by arbitration under the law of that country; and (7) the recognition or enforcement of the award would be contrary to the public policy of that country. New York Convention, art. V. Although the Convention describes these grounds as bases for refusing to recognize and enforce an award, the Eleventh Circuit does not distinguish, for purposes of the Convention's applicability, between a petition to confirm an arbitral award and a motion to vacate an award. *See Industrial Risk Insurers v. M.A.N Gutehoffnungshutte,* 141 F.3d 1434, 1441-43 (11th Cir. 1998) (holding that the Convention's exclusive grounds for refusing confirmation were also the only grounds upon which a court can review a motion to vacate a non-domestic award).

[39]*Id.,* at 1439-41 (finding the 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" and determining that Chapter 1 of the FAA only applied to "domestic arbitral proceedings").

[40]*Yusuf Ahmed Alghanim & Sons v. Toys "R" Us Inc.*, 126 F.3d 15, 21 (2d Cir. 1997).

[41]*Wilko v. Swan*, 346 U.S. 427, 436 (1953).

[42]*Frazier v. CitiFinancial Corp. LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010) (rejecting "manifest disregard" and holding that judicially created bases for vacatur are no longer valid).

[43]For example, a study by the New York City Bar Committee on International Commercial Disputes found that, out of approximately 367 manifest disregard challenges, federal district courts within the Second Circuit only vacated or partially vacated awards in 17 cases and remanded in five cases (6 percent). Comm. on Int'l Commercial Disputes, *The "Manifest Disregard of Law" Doctrine and International Arbitration in New York,* N.Y. City B. 6 (Aug. 2012), http://www2.nycbar.org/pdf/report/uploads/20072344-ManifestDisregardofLaw--DoctrineandInternationalArbitrationinNewYork.pdf.

[44]Richard W. Hulbert, *The Case for A Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 Am. Rev. Int'l Arb. 45 (2011).

[45]*B.L. Harbert Int'l LLC v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006), *abrogated on other grounds by Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1321 (11th Cir. 2010) ("When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken…. Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions."); *World Bus. Paradise Inc. v. Suntrust Bank*, 403 F. App'x 468, 471 (11th Cir. 2010) (discussing court's "willingness to impose sanctions to deter baseless contests of arbitration awards").