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Juan C. Garcia

Ivan Bracho Gonzalez

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Interpretation of Article V of the New York Convention in the Eleventh Circuit: *Industrial Risk Insurers*

JUAN C. GARCIA & IVAN BRACHO GONZALEZ*

The widespread use and growing preference for international arbitration over cross-border litigation is primarily due to the existence of a clear and straightforward regime for the enforcement of arbitration agreements and awards. Even though this was not always the case, through the appearance of the New York Convention and the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration, the treatment and acceptance of international arbitration in different legal regimes has undergone a harmonization process which has served to develop consistency. That harmonization process, however, has not been completed. Several jurisdictions, even within their own borders, apply and interpret the New York Convention differently. One example of those jurisdictions is the United States, where federalism allows that federal law be applied in a non-consistent manner by different federal circuit courts of appeals. In particular, this Article analyzes the persistent notion developed by the United States Court of Appeals for the Eleventh Circuit, which has held and confirmed that the grounds for annulment of a foreign arbitral award—or awards with a foreign component—are those listed in the New York

* Juan C. Garcia is Counsel with the law firm of Hogan Lovells US LLP in Miami, Florida, and is a member of the firm’s International Arbitration Practice Group.

Ivan Bracho González is an Associate with the law firm of Hogan Lovells US LLP in Miami, Florida, and is a member of the firm’s International Arbitration Practice Group.

Convention and not those contemplated by federal law. The case, Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, represents a divorce from longstanding precedent from other circuit courts of appeals, which have correctly and repeatedly held that the grounds for refusing enforcement of an award found in the New York Convention cannot be considered as grounds for annulment.

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*Law is a species of order, and hence good law necessarily implies good order.*¹

I. INTRODUCTION AND OVERVIEW ON THE ENFORCEMENT AND ANNULMENT OF ARBITRAL AWARDS

As international arbitration experienced exponential growth in the early twentieth century, the enforcement of international arbitral

¹ THE POLITICS OF ARISTOTLE 174 (J.E.C. Weldon trans., MacMillan and Co. 1901).

awards depended almost entirely on comity.² Under one view of this regime, known as “Comity of Nations,” the enforcement of foreign legislative, executive, or judicial acts, including arbitral awards, was left to the discretion of the courts of the nation where enforcement was sought.³ According to this theory, courts enforced foreign judgments and awards as a courtesy to foreign states.⁴ This enforcement regime did not serve arbitration well.⁵ Without an international framework establishing a unified procedure for the enforcement of arbitral awards, parties had no certainty whether awards would be enforced and the parties allowed to collect the judgment.⁶ Without such certainty, parties would be reluctant to resolve their disputes through arbitration.⁷

During the 1920s, two seminal treaties, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (collectively, the “Geneva Conventions”) were enacted to facilitate enforcement of both arbitration clauses and arbitral awards, with the goal of making international arbitration a viable and effective dispute resolution method.⁸ The Geneva Conventions established a regime under which parties from different jurisdictions could enforce arbitration clauses and awards in virtually any jurisdiction.⁹

The procedural framework established by the Geneva Conventions, however, soon became burdensome and complex. Parties seeking enforcement of arbitral awards were required to seek confirmation of the award in the jurisdiction where, or under the laws of which, the award was issued before being able to seek enforcement abroad.¹⁰ This “double exequatur” regime was cumbersome

² JACOB VAN DE VALDEN, *FINALITY IN LITIGATION: THE LAW AND PRACTICE OF PRECLUSION – RES JUDICATA (MERGER AND ESTOPPEL), ABUSE OF PROCESS AND RECOGNITION OF FOREIGN JUDGMENTS* 238–42 (2017).

³ *Id.*

⁴ *Id.*

⁵ W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 *TEX. INT’L L.J.* 1, 8–9 (1995).

⁶ *Id.* at 8.

⁷ *Id.*

⁸ *Id.* at 9.

⁹ Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1967, 92 *L.N.T.S.* 302, 305–06 [hereinafter Geneva Convention].

¹⁰ *Id.*

and caused delay because the party seeking enforcement would first need to initiate an action to confirm the award where it was issued, known as the seat of the arbitration, and then bring a second action in the foreign jurisdiction in which enforcement was sought.¹¹

In order to eliminate the need to confirm the award in two jurisdictions, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention” or “Convention”) created a simplified regime allowing the enforcement of both arbitration agreements and arbitration awards.¹² With respect to the enforcement of awards, the New York Convention’s framework allows a successful party in an international arbitration to enforce the award in any jurisdiction where the losing party has assets, provided that such jurisdiction is a contracting state to the Convention, without first confirming the award at the arbitral seat.¹³

The Convention also sets forth the grounds that may be invoked by a party opposing enforcement of the award and the grounds that can be raised *ex officio* by the court in which enforcement is sought to deny the enforcement of an award.¹⁴ The Convention, therefore, governs both enforcement and denial of enforcement of an arbitral award.¹⁵ The Convention, however, does not establish grounds for the annulment or vacatur of arbitral awards and does not apply to annulment proceedings.¹⁶

Denying enforcement of an arbitral award is very different from annulling or vacating an award, and the two concepts are not interchangeable.¹⁷ Each concept grants the parties distinct legal rights

¹¹ *Id.*

¹² May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 ARIZ. J. OF INT’L AND COMP. LAW 747, 749 (2006).

¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. III–IV, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

¹⁴ *Id.* art. V(2).

¹⁵ *See id.*

¹⁶ ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: AN OVERVIEW 4 (last visited April 22, 2020) https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (last visited Feb. 24, 2020).

¹⁷ *Id.*

and is subject to different legal and procedural requirements.¹⁸ The difference between the two concepts is best understood by analyzing the actions parties may take after an arbitral tribunal issues its award.¹⁹

If the losing party does not voluntarily comply with the terms of the award, the winning party may seek to enforce the award either in the jurisdiction where the award was issued (the arbitral seat) or in any other jurisdiction where the losing party has assets.²⁰ Conversely, the losing party may oppose enforcement of the award in any of the jurisdictions where the winning party seeks to enforce, based on the grounds established in the New York Convention.²¹ The losing party may also seek to vacate or annul the award at the seat of the arbitration.²² The procedure and grounds for annulling the award are established by the *lex arbitri*, or the law of the seat of the arbitration, rather than by the New York Convention.²³

Each mechanism also has a different legal effect on the arbitral award.²⁴ Annulment or vacatur of an award, according to the general rule adopted by most courts throughout the world, annuls the award and precludes it from having any legal effect whatsoever.²⁵ This approach, known as *Ex Nihilo Nihil Fit*, stands for the proposition that, once the award is annulled by a court of the seat of the arbitration—or primary jurisdiction—it cannot produce any legal effects because “nothing comes from nothing.”²⁶ As such, an award that has been annulled at the seat cannot then be enforced in another jurisdiction.

¹⁸ *Id.*

¹⁹ *Id.* at 4, 13–14.

²⁰ Lu, *supra* note 12, at 748.

²¹ *Id.* at 748, 755.

²² VAN DEN BERG, *supra* note 16, at 4.

²³ Claudia Salomon & Irina Sivachenko, *Choosing an Arbitral Seat in the United States* (last visited Apr. 22, 2020), <https://www.lw.com/thoughtLeadership/choosing-an-arbitral-seat-in-the-us> (explaining that the “*Lex Arbitri*” or “*Lex Loci Arbitri*” refers to the law of the seat or the place of arbitration); see New York Convention, *supra* note 13, art. V(1)(e) (stating that the seat can be defined as the country “in which, or under the law of which, [the] award was made”).

²⁴ William W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction, V. Items for Further Consideration*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 112, 127 (Albert Jan van den Berg ed., 2007).

²⁵ *Id.*

²⁶ *Id.*

To the contrary, when a court in an enforcing jurisdiction refuses or denies the enforcement of an award, such denial does not alter the legal status of the award.²⁷ In other words, a denial of enforcement does not annul the award nor preclude its subsequent enforcement in another jurisdiction.²⁸

Consequently, courts at the seat of arbitration play an important role in the annulment process as they are the “competent authority,” as envisaged by the Convention, tasked with deciding annulment petitions.²⁹ Accordingly, courts deciding annulment or enforcement petitions must have a clear understanding of the relevant framework applicable to these proceedings, because as described above, each cause of action is different and will have a different effect upon the award, and the parties’ rights.

Given the crucial role played by courts at the seat, this chapter will address an exceptional instance in which a federal appellate court in the United States “conflated” the grounds for denying enforcement and vacating arbitral awards.³⁰ More specifically, it will analyze a unique case from the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) where the court ignored the distinction between the denial of enforcement and annulment of arbitral awards previously established by other circuit courts in the

²⁷ Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. INT’L L. & POL. 175, 196 (1995).

²⁸ It must be noted that the general rule on enforcement of awards is that once an award has been annulled at the legal seat of the arbitration, it cannot be enforced in any other jurisdiction. However, there have been some instances in which courts of secondary jurisdiction have allowed enforcement of awards that were previously annulled. Yet, the issue of enforcement of awards notwithstanding their annulment has generated a hotly debated among scholars and courts, and consensus on the matter has not been reached.

²⁹ See New York Convention, *supra* note 13, art. V(1) (stating that “[r]ecognition 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.”) (emphasis added). However, that is not to say that courts at the seat will not decide motions from parties resisting enforcement, as that could be the case.

³⁰ Juan C. Garcia, Juliana de Valdenebro & Daniela Tagtachian, *A Legal Framework Is Only as Good as Its Implementation: The Conflation of Grounds for Denying Enforcement and Vacating Arbitral Awards in Industrial Risk*, XXXIII(3) INT’L L.Q. 22, 23 (2017).

United States, and thus failed to properly identify the grounds for vacatur.

It must be noted at the outset that the grounds for annulment or vacatur in most jurisdictions mirror the grounds for refusing enforcement under the New York Convention, and as such it may appear as the distinction is one of no consequence. That is not the case, however, in the United States, and therefore ignoring the distinction between vacatur and denial of enforcement can have significant consequences.³¹

II. ENFORCEMENT OF ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

As mentioned in Part I, the New York Convention was intended to simplify the burdensome and lengthy process of enforcement of international arbitral awards under the Geneva Conventions. In order to promote efficiency, the Convention sets forth an exclusive list of grounds upon which a court may deny enforcement of an award.³²

Article V(1) of the Convention establishes that “[r]ecognition and enforcement of the award may be refused . . . **only if** that party [opposing enforcement] furnishes to the competent authority where the recognition and enforcement is sought, proof” that one of the grounds listed therein is present.³³ In other words, a court must enforce an international arbitral award unless the party resisting enforcement successfully proves that one of the grounds for refusing enforcement.

The exclusive grounds for denying enforcement of an award under Article V(1) of the Convention include the following:

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:

³¹ *Id.* at 22–23.

³² Craig, *supra* note 5, at 10.

³³ New York Convention, *supra* note 13, art. V(1).

- (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 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 arbitration or of the 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 decision on matters submitted to arbitration can be separated from those not 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 which, that award was made.³⁴

Additionally, Article V(2) lists the grounds upon which courts of the enforcing jurisdiction can rely *ex officio* to deny enforcement. Article V(2) provides the following:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the

³⁴ *Id.* (emphasis added).

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.³⁵

As noted above, the grounds included in the Convention are only available to parties opposing enforcement of an arbitral award. The Convention does not establish grounds for the annulment of arbitral awards.³⁶ Although the Convention does not explicitly distinguish between denial of enforcement and annulment of an award, Article V(1)(e) implicitly recognizes this distinction, providing that a party may oppose enforcement of an award when “[t]he 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.”³⁷ Article V(1)(e) presupposes the existence of a different procedure for annulment by the courts of the seat of the arbitration in accordance with the laws of the seat.

This distinction is consistent with the contracting parties’ concern that including grounds for annulment in the Convention could impact their sovereignty and ability to regulate their internal matters.³⁸ As recognized by Leonard V. Quigley, a member of the Council on Foreign Relations, in an article published merely three years after the creation of the Convention:

Significantly, [Article V(1)(e) of the New York Convention] 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

³⁵ *Id.* art. V(2).

³⁶ VAN DEN BERG, *supra* note 16, at 4.

³⁷ See New York Convention, *supra* note 13, art. V(1)(e) (emphasis added).

³⁸ 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, 1069–70 (1961).

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.³⁹

In short, including grounds for annulment in the Convention would have imposed upon the Convention an “authority and scope which the document’s framers and signatory states not only did not intend, but likely did not foresee.”⁴⁰

III. VACATUR OR ANNULMENT OF ARBITRAL AWARDS

In a typical international arbitration, the parties specify the juridical seat of the arbitration in the arbitration agreement.⁴¹ The seat of arbitration, in turn, determines the procedural law for the conduct of the arbitration, also known as the *lex arbitri*.⁴² In other words, “the local courts of the seat of arbitration may, depending on the local law, have the opportunity to intervene to designate the arbitral tribunal grant interim measures, or, rule on applications to set aside or vacate awards.”⁴³ Therefore, the seat determines the law that will be applied to applications or motions to vacate or annul arbitral awards.

A. *Annulment framework in jurisdictions following the UNCITRAL Model Law*

The United Nations Commission on International Trade Law (“UNCITRAL”) adopted the UNCITRAL Model Law on International Commercial Arbitration on June 21, 1985, for the purpose of “assist[ing] States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and

³⁹ *Id.* at 1070.

⁴⁰ Harout Jack Samra, *Two to Tango: Domestic Grounds for Vacatur Under the New York Convention*, 20(3) AM. REV. INT’L ARB., 367, 379 (2009).

⁴¹ Salomon & Sivachenko, *supra* note 23.

⁴² *Id.*

⁴³ LUCY FERGUSON REED ET AL., GUIDE TO ICSID ARBITRATION 1, 14 (2010).

needs of international commercial arbitration.”⁴⁴ The Model Law, with its subsequent amendment of 2006, “reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.”⁴⁵

Though not binding in nature, the Model Law proposes a text that states are free to adopt as their domestic arbitral law.⁴⁶ Indeed, with limited modifications in some jurisdictions, the Model Law has been adopted by eighty nations.⁴⁷ In jurisdictions in which it has been adopted in whole or in part, the Model Law constitutes the *lex arbitri*, which as stated above, sets forth the framework for annulment or vacatur of arbitration awards.

Regarding annulment, article 34 of the Model Law establishes “the application for setting aside as [the] exclusive recourse against [an] arbitral award,” and lists the grounds upon which courts at the seat of arbitration can rely on to annul or vacate an award.⁴⁸ Notably, article 34 lists the exact same grounds for annulment that are found in article V of the New York Convention for denying enforcement of an award.⁴⁹

Given that the grounds for denying enforcement under the New York Convention are identical to the grounds for annulment under the Model Law, any distinction between the two mechanisms may seem meaningless. While this may be the case in jurisdictions where the Model Law has been adopted as *lex arbitri* without any modifications, ignoring the key distinctions between denying enforcement and annulment may have significant consequences in jurisdictions

⁴⁴ *UNCITRAL Model Law on International Commercial Arbitration (1985) with Amendments as Adopted in 2006*, UNITED NATIONS COMM’N ON INT’L TRADE LAW, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (last visited Apr. 22, 2020) [hereinafter *UNCITRAL Model Law Webpage*]; see generally *UNCITRAL MODEL LAW ON INT’L COMMERCIAL ARBITRATION (UNITED NATIONS 2006)* [hereinafter *UNCITRAL MODEL LAW*].

⁴⁵ *UNCITRAL Model Law Webpage*, *supra* note 44.

⁴⁶ See *UNCITRAL MODEL LAW*, *supra* note 44.

⁴⁷ *UNCITRAL Model Law on International Commercial Arbitration (1985) with Amendments as Adopted in 2006*, UNITED NATIONS COMM’N ON INT’L TRADE LAW, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Apr. 22, 2020) [hereinafter *UNCITRAL Model Law Status*].

⁴⁸ *UNCITRAL MODEL LAW*, *supra* note 44, art. 34.

⁴⁹ Compare *id.*, with New York Convention, *supra* note 13, art. V.

in which the Model Law has not been adopted as the *lex arbitri*. In these jurisdictions, grounds for vacatur may very well differ from those established in the New York Convention regarding denial of enforcement.⁵⁰ One notable jurisdiction that has not adopted the Model Law as its *lex arbitri* is the United States.⁵¹

B. *Annulment Framework in the United States*

The Federal Arbitration Act (“FAA”), codified in Title 9 of the United States Code, establishes the federal arbitral framework in the United States. The FAA consists of three chapters. The first chapter, 9 U.S.C. §§ 1–16 (“Chapter One”), enacted in 1925 and codified in 1947, covers domestic arbitrations and provides the grounds for annulment of a domestic arbitral award.⁵²

The grounds to annul an arbitral award under Chapter One are listed in Section 10 and include the following:

- (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.⁵³

Unlike the Model Law, the grounds for annulling an award under Chapter One of the FAA are different than those for denying

⁵⁰ Garcia, de Valdenebro & Tagtachian, *supra* note 30, at 23.

⁵¹ *Id.*

⁵² 9 U.S.C. §§ 1–16 (2018).

⁵³ 9 U.S.C. § 10 (2018).

enforcement under the New York Convention.⁵⁴ Moreover, over time, courts have established non-statutory or implied grounds for annulling arbitral awards in addition to those set forth in Chapter One of the FAA.⁵⁵ These grounds, which include, among others, “manifest disregard of the law,” have been recognized and applied by some courts, but not accepted by others.⁵⁶

The second chapter of the FAA, 9 U.S.C. §§ 201–08 (“Chapter Two”), which was added in 1970, incorporates the New York Convention and applies to all international, non-domestic, or foreign awards.⁵⁷ Section 202 of Chapter Two provides that an award shall be deemed foreign or non-domestic if it has an international element (i.e., it “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states”), even if the award arises out of a relationship between two United States citizens.⁵⁸ Chapter Two includes the same grounds for denying the enforcement of an award listed in the New York Convention but, notably, does not include any grounds for the annulment of arbitral awards.⁵⁹

Congress also included in Chapter Two a special provision, § 208, which provides guidance regarding how to resolve a conflict between chapters of the FAA.⁶⁰ This provision, known as the “residual clause,” states that Chapter One may be used to fill in the gaps in Chapter Two, allowing the application of the former as long as it does not conflict with the latter.⁶¹ As explained below, the overwhelming majority of United States courts have consistently held, relying on the residual clause, that the grounds for vacating an arbitral award included in Chapter One for domestic arbitrations also

⁵⁴ Compare *id.*, with New York Convention, *supra* note 13, art. V.

⁵⁵ Jonathan J. Tompkins, *Manifest Disregard of the Law: The Continuing Evolution of an Historically Ambiguous Vacatur Standard*, 12 DISP. RESOL. INT’L 145, 147–49 (2018).

⁵⁶ See generally *id.* (discussion on the “manifest disregard of the law” standard).

⁵⁷ 9 U.S.C. §§ 201–08.

⁵⁸ Garcia, de Valdenebro & Tagtachian., *supra* note 30, at 23.

⁵⁹ 9 U.S.C. §§ 201–08.

⁶⁰ 9 U.S.C. § 208 (providing that “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States”).

⁶¹ Garcia, de Valdenebro & Tagtachian., *supra* note 30, at 23.

apply to the vacatur of an international arbitral award, and that the grounds included in Chapter Two apply only to proceedings to oppose enforcement of an award.

Finally, the FAA's third chapter, §§ 301–07 (“Chapter Three”), incorporates the Inter-American Convention on International Commercial Arbitration of 1975 (“Panama Convention”), which was promulgated by the Organization of American States (“OAS”) for the purpose of creating “a viable, treaty-based system for resolving inter-American commercial disputes by arbitration.”⁶² Further, it was intended to counteract and soften the effects of the Calvo Doctrine in Latin America, under the auspices of which many Latin American states had refused to ratify the New York Convention.⁶³ As such, the Panama Convention, with similar provisions as those of the New York Convention regarding recognition and enforcement of arbitral agreements and awards, emerged as a viable alternative to those nations who were, at the time, reluctant to adopt the latter.⁶⁴

1. ANNULMENT OF “NON-DOMESTIC” AWARDS RENDERED IN THE UNITED STATES UNDER THE FAA

In light of the framework described above, the following conclusions can be drawn regarding the application of the FAA to non-domestic, or international, arbitral awards. First, § 10 of Chapter One is the only provision within the FAA that states or lists *grounds for annulment* of arbitral awards.⁶⁵ Second, § 202 of Chapter Two, which incorporates the New York Convention, applies to foreign and non-domestic awards, which are understood as those involving an international element, and lists the *grounds for denying the enforcement* of an award contained in the New York Convention.⁶⁶ Third, § 208 of Chapter Two, known as the “residual clause,” states that Chapter One may be used to fill in the gaps in Chapter Two, allowing the application of the former as long as it does not conflict

⁶² Joseph Jackson Jr., *The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems*, 8 J. INT’L ARB. 91, 91–100 (1991) (quoting Charles Robert Norberg, *United States Implements Inter-American Convention on Commercial Arbitration*, 45 ARB J. 23, 23 (1990)).

⁶³ *Id.* at 92–94.

⁶⁴ *Id.* at 91.

⁶⁵ Garcia, de Valdenebro & Tagtachian, *supra* note 30, at 23.

⁶⁶ *Id.*

with the latter.⁶⁷ Finally, Chapter Three, which incorporates the Panama Convention, also contains grounds for refusing enforcement of awards where the parties are nationals of Latin American contracting states and the requirements for the application of the Convention are met.⁶⁸

Based on foregoing, therefore, it appears at first glance that there are no grounds for annulment of non-domestic arbitral awards in the FAA unless the residual clause of Chapter Three is used to “fill the gap.” The United States Court of Appeals for the Second Circuit addressed this very issue in *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*⁶⁹ and concluded that the grounds listed in § 10 of the FAA for annulment actions brought against domestic awards also apply to annulment actions relating to international or non-domestic awards.

In *Yusuf*, a foreign licensee sought to confirm, under the New York Convention, an arbitral award against Toys “R” Us, Inc. as licensor.⁷⁰ The arbitration was seated in the United States and the proceedings involved a dispute regarding a failed license agreement in which Toys “R” Us granted Yusuf Ahmed Alghanim and Sons, W.L.L. a limited right to open Toys “R” Us stores throughout the Middle East.⁷¹ After being awarded more than \$46 million for lost profits, plus interest, Alghanim sought to have the award confirmed in the District Court for the Southern District of New York.⁷² Toys “R” Us cross-moved to vacate the award under § 10 of Chapter One of the FAA, arguing that it was clearly irrational and manifestly disregarded the law and the agreement.⁷³ The award was considered a non-domestic award because, even though the arbitration was seated in the United States, the dispute “involved two nondomestic parties and one United States corporation, and principally involved conduct and contract performance in the Middle East.”⁷⁴

The Southern District of New York held that,

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 126 F.3d 15, 21 (2d Cir. 1997), *cert. denied* 522 U.S. 1111 (1998).

⁷⁰ *Id.* at 18.

⁷¹ *Id.* at 17.

⁷² *Id.* at 15, 18.

⁷³ *Id.* at 18.

⁷⁴ *Id.* at 19.

while the petition for confirmation was brought under the [New York Convention], [Toys “R” Us’] cross-motion to vacate or modify the award was properly brought under [Chapter One of] the Federal Arbitration Act, and thus those claims were governed by [Chapter One of] the Federal Arbitration Act’s implied⁷⁵ grounds for vacatur.”⁷⁶

Ultimately, the district court confirmed the award and denied Toys “R” Us’ cross-motion to vacate, finding the latter’s objections to be without merit as the arbitrators had not manifestly disregarded the law.⁷⁷

Toys “R” Us appealed to the Second Circuit, arguing that the district court erred in finding that there had been no manifest disregard of the law by the arbitral tribunal.⁷⁸ The primary issue before the Second Circuit was whether the grounds for annulment established by Chapter One of the FAA for domestic arbitral awards, including the non-statutory or implied grounds, could be invoked against a non-domestic award.⁷⁹ The court ultimately affirmed the district court’s holding, finding that the arbitrators had not manifestly disregarded the law.⁸⁰

In so doing, the court reasoned that Article V(1)(e) of the Convention (codified as Chapter 2 of the FAA) “allow[s] 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 the arbitral award.”⁸¹ The Court further noted that Article V(1)(e) of the Convention does not specify grounds to vacate an award because “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

⁷⁵ The grounds are considered “implied” because the grounds relied upon are not expressly enumerated in Chapter One, but they have been “read into” Chapter One based on subsequent court decisions.

⁷⁶ *Yusuf*, 126 F.3d at 16.

⁷⁷ *Id.* at 16–17.

⁷⁸ *Id.* at 16, 18.

⁷⁹ *Id.* at 20–21.

⁸⁰ *Id.* at 25.

⁸¹ *Id.* at 21.

competence of the conference.”⁸² The Court stated that “the language and history of the Convention” made clear that a petition to annul a foreign award in the state where the award was rendered “is to be governed by domestic law of the rendering state, despite the fact that the award is non-domestic within the meaning of the Convention[.]”⁸³

The Second Circuit then correctly distinguished between the standards that govern annulment of a non-domestic award and the defenses against confirmation of non-domestic award.⁸⁴ The court held as follows:

[W]e conclude 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. *See* Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.⁸⁵

The Second Circuit thus clarified the operative arbitral framework in the United States and recognized the authority of U.S. courts to apply domestic arbitration law (namely Chapter One of the FAA and its implied grounds) in annulment proceedings against non-domestic awards. Interestingly, the Second Circuit appears not to have relied on the residual clause of § 208 of Chapter Two of the FAA, but instead on the exclusive authority allocated by the Convention to the courts of the seat to vacate or set aside awards based on their

⁸² *Id.* at 22 (citing Quigley, *supra* note 38, at 1070).

⁸³ *Yusuf*, 126 F.3d at 23.

⁸⁴ *Id.*

⁸⁵ *Id.*

domestic arbitration laws.⁸⁶ The court, however, implicitly recognized the role of the residual clause because it merely concluded that “awards may be vacated, *see* 9 U.S.C. § 10, or modified,”⁸⁷ citing § 10 of Chapter One of the FAA, and applied the grounds for vacatur of domestic awards to a non-domestic award.⁸⁸ One could assume, therefore, that the Second Circuit relied on the gap-filler provision to fill the void between Chapter One and Chapter Two.

The Third,⁸⁹ Fifth,⁹⁰ and Sixth⁹¹ Circuits have endorsed the Second Circuit’s holding in *Yusuf*. In fact, the Fifth Circuit has gone one step further.

In *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (“Negara II”),⁹² the Fifth Circuit developed key nomenclature in order to better understand the framework applicable to enforcement and vacatur motions. The Fifth Circuit noted:

The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards. Only a court in a country with *primary jurisdiction* over an arbitral award may annul that award. Courts in other countries have *secondary jurisdiction*; a court in a country with secondary jurisdiction is limited to deciding

⁸⁶ *See id.* (discussing the “Convention” and not the FAA).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See Ario v. Underwriting Members of Syndicate 53*, 618 F.3d 277, 290–92 (3d Cir. 2010) (holding that application of United States law, including the domestic FAA and its vacatur standard, was warranted because the arbitration took place in Philadelphia and the enforcement action was brought in Philadelphia).

⁹⁰ *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (“Negara I”), 335 F.3d 357, 368 (5th Cir. 2003) (“By its silence on the matter, the Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award.”).

⁹¹ *See Jacada (Europe), Ltd. v. Int’l Mktg. Strategies, Inc.*, 401 F.3d 701, 709 n.8 (6th Cir. 2005). *Assocs. v. Mattel, Inc.*, 552 U.S. 576, 583–84 (2008) (“[T]he award in this case was made in the United States, and therefore Article V(1)(e) authorizes this court to consider our domestic law, as it is the law where the award was made.”).

⁹² *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (“Negara II”), 364 F.3d 274 (5th Cir. 2004).

whether the award may be enforced in that country. The Convention “mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought.” Under the Convention, “the country in which, or under the [arbitration] law of which, [an] award was made” is said to have *primary jurisdiction* over the arbitration award. All other signatory states are *secondary jurisdictions*, in which parties can only contest whether that state should enforce the arbitral award. It is clear that the district court had secondary jurisdiction and considered only whether to enforce the Award in the United States. Article V enumerates specific grounds on which a court with secondary jurisdiction may refuse enforcement.⁹³

The resulting framework applicable to awards in the United States, in light of the Second Circuit’s opinion in *Yusuf* and the Fifth Circuit’s opinion in *Karaha Bodas*, is therefore clear. Courts of the jurisdiction in which the award is made, in other words, courts of the arbitral seat, are considered courts of “primary jurisdiction” and have the authority to annul or vacate an award on the grounds enumerated in its domestic arbitration law. All other courts are considered courts of “secondary jurisdiction” and may only enforce, or deny enforcement, of an award based on the grounds set forth in the Convention.

IV. *INDUSTRIAL RISK INSURERS* AND THE ELEVENTH CIRCUIT’S CONFLATION OF GROUNDS FOR DENYING ENFORCEMENT AND VACATING ARBITRAL AWARDS

Notwithstanding the extensive reasoning presented by the Second Circuit’s 1997 opinion in *Yusuf* and the Fifth Circuit’s decision in *Nagara II*, the Eleventh Circuit, when faced with an identical question as to the grounds applicable to a vacatur petition of a non-domestic award in 1998, inexplicably held that a party seeking to

⁹³ *Id.* at 287 (emphasis added).

vacate or annul an arbitral award can only rely on the grounds listed in Article V of the Convention, which, as has been extensively discussed before, are only available to parties resisting enforcement.

The case in question, *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*,⁹⁴ involved a complex commercial dispute in which a Florida nitric acid manufacturer, Nitram, Inc. (“Nitram”), contracted with a Texas corporation, Barnard and Burk Group, Inc., for the provision and installation of a tail gas expander in Nitram’s manufacturing plant.⁹⁵ The Texas corporation then contracted with a Louisiana corporation, Barnard and Burk Engineers and Constructors, Inc. (“Barnard Group and Engineers”) to perform the engineering work for the installation.⁹⁶ Barnard Group and Engineers subsequently contracted with a German turbine manufacturer, M.A.N. Maschinentabrik Augsburg-Nürnberg AG (“MAN”), to purchase the tail gas expander.⁹⁷ As the successor-in-interest to MAN, M.A.N. Gutehoffnungshütte GmbH (“MAN GHH”) was responsible for designing, manufacturing, and delivering the tail gas expander, and for providing technical guidance regarding its installation.⁹⁸ Barnard Group and Engineers, on the other hand, was responsible for the piping for the tail gas expander.⁹⁹ The installed equipment subsequently crashed on two occasions.¹⁰⁰ Industrial Risk Insurers, a Hartford-based insurance company, had provided business risk insurance to Nitram.¹⁰¹ In 1985, Nitram sued both Industrial Risk Insurers and Barnard and Burk Group, Inc., arguing that one of the two defendants was responsible for the payment of losses.¹⁰² After settling the state litigation, the parties agreed to submit several remaining issues to arbitration.¹⁰³

At the heart of the claims in the arbitration proceedings was whether the two wrecks were caused by Barnard Group and

⁹⁴ *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

⁹⁵ *Id.* at 1437.

⁹⁶ *Id.* at 1438.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1439.

Engineers' design and piping or by MAN GHH's expander.¹⁰⁴ The arbitral tribunal ruled in favor of MAN GHH, concluding that Barnard Group and Engineers' design and piping caused the two wrecks, and awarding MAN GHH costs and conversion rate compensation.¹⁰⁵ Barnard Group and Engineers moved to annul or vacate the arbitration award at the seat of the arbitration, and specifically in the United States District Court for the Middle District of Florida, on the grounds that "the award was 'arbitrary and capricious' and that the arbitration panel improperly and prejudicially admitted certain testimony and evidence."¹⁰⁶ The grounds, the court interpreted, did not both fall squarely within the New York Convention, because even though the challenge pertaining to the improperly admitted evidence could be considered to be based on Article V(1)(d) of the Convention, the "arbitrary and capricious" challenge, raised under Chapter 2 of the FAA, was not enumerated by the New York Convention.¹⁰⁷ The district court denied the motion for vacatur and confirmed the award.¹⁰⁸ Barnard Group and Engineers appealed the denial of the motion for vacatur.¹⁰⁹

On appeal, the relevant issue before the Eleventh Circuit, just as in *Yusuf*, involved whether the grounds for annulment established in Chapter One of the FAA applied to non-domestic awards.¹¹⁰ Contrary to what the Second Circuit had decided roughly a year before, however, the Eleventh Circuit held that the annulment proceeding was governed by Chapter Two, which lists the grounds for denial of enforcement (not annulment), because Chapter Two applied to "all arbitral awards not 'entirely between citizens of the United States'" and, because the award had been made "within the legal framework of another country."¹¹¹

The court mistakenly considered that the international nature of the award implied that all proceedings relating to it shall be governed by Chapter Two and ignored the residual clause included in

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See Nitram, Inc. v. Indus. Risk Insurers*, 848 F. Supp. 162, 165 (M.D. Fla. 1994).

¹⁰⁸ *Indus. Risk Insurers*, 141 F.3d at 1439.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1439–40.

¹¹¹ *Id.* at 1440–41.

§ 208 of that same chapter. In so doing, it also ignored the difference between the grounds for vacating awards and those for denying enforcement of an award which the Second Circuit had considered key in *Yusuf*.

The court then addressed the grounds for vacatur that could be raised to annul a non-domestic award rendered in the United States.¹¹² Specifically, the court analyzed whether a non-domestic arbitral award could be annulled on the ground that it is “arbitrary and capricious.”¹¹³ Instead of conducting the appropriate analysis pursuant to Article V of the Convention and the residual clause of the FAA, which leads to an application of the grounds established in § 10(a)(1)(4) of Chapter One, the court incorrectly concluded that a party seeking to annul or vacate a non-domestic award can only rely on the grounds to challenge enforcement of a non-domestic award provided by Article V of the New York Convention.¹¹⁴

Applying this flawed analytical framework, the court determined that the award could not be annulled on the ground that it was “arbitrary and capricious” because it was not one of the enumerated defenses provided by the New York Convention.¹¹⁵ The court noted: “that no defense against enforcement of an international arbitral award under Chapter 2 of the FAA is available on the ground that the award is ‘arbitrary and capricious,’ or on any other grounds not specified by the Convention.”¹¹⁶ Surprisingly, even though the court repeatedly cited to *Yusuf*, it failed to understand the distinction between vacatur petitions and motions to deny enforcement of an award, instead applying the grounds for denial of enforcement to an annulment petition.

V. RECENT DECISIONS UPHOLDING OR DISTINGUISHING *INDUSTRIAL RISK*

In light of the Eleventh Circuit’s decision in *Industrial Risk*, courts within the circuit have followed its holding and applied it to

¹¹² *Id.* at 1445.

¹¹³ *Id.* at 1445–46.

¹¹⁴ *Id.* at 1443, 1445–46.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1443.

cases before them.¹¹⁷ Nonetheless, even though the Eleventh Circuit recently had the opportunity to revisit its holding and change course in *Bamberger Rosenheim, Ltd. v. OA Development, Inc.*,¹¹⁸ it avoided addressing the issue directly.

In *Bamberger*, the Eleventh Circuit was faced with an appeal from the U.S. District Court for the Northern District of Georgia.¹¹⁹ The case involved Bamberger Rosenheim, Ltd. (“Profimex”), an Israeli company focused on raising capital for real estate investments, and OA Development, Inc. (“OAD”), a Georgia real estate developer.¹²⁰ Profimex and OAD entered into a solicitation agreement that provided for the arbitration of disputes submitted by OAD in Tel Aviv, Israel, and for the arbitration of disputes submitted by Profimex in Atlanta, Georgia.¹²¹ After relations between the parties deteriorated, Profimex commenced arbitration in Atlanta against OAD for breach of contract.¹²² OAD submitted a counterclaim against Profimex alleging that it had defamed OAD in statements to Israeli investors.¹²³ Profimex objected to the counterclaim’s arbitration in Atlanta, arguing that pursuant to the arbitration agreement, OAD’s claims must be arbitrated in Tel Aviv.¹²⁴ The arbitrator ultimately determined that venue for the defamation counterclaim was proper in Atlanta and found Profimex liable on OAD’s defamation counterclaim.¹²⁵

The appellant, Profimex, filed a petition to vacate the arbitrator’s defamation award in the Northern District of Georgia, and OAD cross-petitioned to confirm the award.¹²⁶ Profimex raised several grounds for vacatur and defenses against confirmation, but the court

¹¹⁷ See generally, e.g., *Gonsalvez v. Celebrity Cruises, Inc.*, 935 F. Supp. 2d 1325 (S.D. Fla. 2013); *Royal Caribbean Cruises Ltd. v. Soskin*, No. 17-21663-Civ, 2019 U.S. Dist. LEXIS 20096 (S.D. Fla. Feb. 6, 2019); *Williams v. NCL (Bah.) Ltd.*, No. 18-22774-CV, 2018 U.S. Dist. LEXIS 189286 (S.D. Fla. Nov. 6, 2018); *Pochat v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-22397-CIV, 2013 U.S. Dist. LEXIS 119447 (S.D. Fla. Aug. 22, 2013).

¹¹⁸ 862 F.3d 1284 (11th Cir. 2017).

¹¹⁹ *Id.* at 1284.

¹²⁰ *Id.* at 1286.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1285–86.

confirmed the award.¹²⁷ Profimex argued that the district court had erred in denying its petition to vacate the award because “the arbitral procedure [had not been conducted] in accordance with the agreement of the parties,” contravening Article V(1)(d) of the New York Convention.¹²⁸ It also argued that the district court had erred in denying its petition under Chapter One because the arbitrator had exceeded its powers in violation of 9 U.S.C. § 10(a)(4).¹²⁹

Even though this was an opportunity for the Eleventh Circuit to further confirm or finally abandon *Industrial Risk*, it avoided the issue altogether by stating that it “[saw] no reason to analyze Profimex’s arguments under the New York Convention or § 10(a)(4) [Chapter One] separately.”¹³⁰ The court considered that the arguments were intertwined because Profimex asserted that “the arbitrator improperly applied the arbitral-venue provision in the parties’ agreement to arbitrate.”¹³¹ The crux of both arguments, the court considered, was the fact that OAD’s counterclaim had been arbitrated in Atlanta, which led Profimex to argue both that the arbitral procedure had not been in accordance with the agreement of the parties in contravention of Article V(1)(d) of the New York Convention and that the arbitrator had exceeded its powers in violation of Chapter One.¹³²

The Eleventh Circuit initially confirmed the lower court holding denying the vacatur petition, quoting *Industrial Risk*, and finding that non-domestic awards “*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,”¹³³ but did not expressly address whether the challenge raised under 9 U.S.C. § 10(a)(4) was admissible.

Therefore, even though the Eleventh Circuit affirmed *Industrial Risk*’s premise that non-domestic awards can only be vacated—in the United States—if one of the exclusive grounds of Article V of

¹²⁷ *Id.* at 1286.

¹²⁸ *Id.* at 1287.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (quoting *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998)).

the New York Convention is successfully asserted, it did not explicitly reject Profimex's challenge under Chapter One of the FAA. Whether it deliberately did so was a question that remained, for the moment, unanswered.

The question, however, did not remain unanswered for long. Recently, the opportunity again arose for the Eleventh Circuit to correct its error in *Industrial Risk*. Instead of embracing the approach taken by the majority of federal circuits, however, the Eleventh Circuit in *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*¹³⁴ once again affirmed its holding in *Industrial Risk*. In addition to standing by *Industrial Risk*, the Eleventh Circuit upheld sanctions that were imposed on a party for having raised what it considered "baseless" grounds for vacatur, "especially considering that INPROTSA [had] failed to assert a valid defense under the [New York] Convention."¹³⁵ In so doing, the court's decision demonstrates the serious consequences that can arise from a fundamental misconception and misunderstanding of the framework applicable to the vacatur of arbitral awards discussed above.

In *INPROTSA*, Del Monte initiated arbitration proceedings against INPROTSA in Miami.¹³⁶ The arbitral tribunal rendered an award in June 2016 finding that INPROTSA had breached its purchase and sale agreement with Del Monte pertaining to the production, packaging, and sale of pineapples.¹³⁷ In September 2016, INPROTSA sought to vacate the award in state court.¹³⁸ The petition was ultimately removed to federal court following Del Monte's removal petition.¹³⁹ Del Monte then moved both to dismiss the vacatur

¹³⁴ *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH* ("INPROTSA 2019"), 783 F. App'x 972, 974 (11th Cir. 2019). In full transparency, the author's law firm, Hogan Lovells US LLP, was counsel of record for *Inversiones y Procesadora Tropical INPROTSA, S.A.* in the underlying arbitration proceedings and subsequent vacatur actions and appeals. The author, Juan C. Garcia, worked on the matter as a member of the firm. The co-author, Ivan Bracho Gonzalez, also worked on the matter as a summer associate for the firm Hogan Lovells US, LLP.

¹³⁵ *Id.*

¹³⁶ *Id.* at 973.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

petition and to confirm the award.¹⁴⁰ INPROTSA, on the other hand, moved to remand the proceeding to state court, alleging that the district court lacked subject-matter jurisdiction.¹⁴¹

The Southern District granted Del Monte's motion to dismiss INPROTSA's vacatur petition and denied the latter's motion to remand, concluding that its petition, based on Florida law, had "failed to assert a valid defense *under the [New York Convention]*, as required by [*Industrial Risk*]." ¹⁴² In short, the court, relying on *Industrial Risk*, applied the grounds for denying the enforcement of an arbitral award under the New York Convention to a vacatur petition.

The magistrate judge's discussion and consideration of INPROTSA's alleged grounds for vacatur, which was implicitly adopted by the Eleventh Circuit, was limited to stating that the petition to vacate had "not raise[d] cognizable grounds for vacatur," concluding that under controlling precedent from the Eleventh Circuit, namely *Industrial Risk*, the grounds to vacate international arbitration awards are limited to those contained in the New York Convention.¹⁴³ Despite INPROTSA's attempts at clarifying the patent conflation by reiterating that the petition sought vacatur and that it had appropriately relied on grounds for vacatur found in the FAA as opposed to the New York Convention, its efforts were to no avail.¹⁴⁴

Based on the Southern District's decision, Del Monte then sought attorney's fees "under the court's inherent authority, claiming INPROTSA's grounds to seek vacatur were baseless and brought in bad faith."¹⁴⁵ A magistrate judge recommended granting Del Monte's motion, considering that "INPROTSA's petition to vacate lacked any real basis for vacatur, and 'amount[ed] to little more than an assault on the Tribunal's factfinding and contractual interpretation rather than on its actual authority.'" ¹⁴⁶ The Southern

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 973–74 (emphasis added).

¹⁴³ *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH* ("INPROTSA 2018"), No. 16-24275-CV, 2018 U.S. Dist. LEXIS 152115, at *13 (S.D. Fla. Sept. 4, 2018); *see also INPROTSA 2019*, 783 F. App'x at 973–74.

¹⁴⁴ *INPROTSA 2018*, 2018 U.S. Dist. LEXIS 152115, at *8–9.

¹⁴⁵ *INPROTSA 2019*, 783 F. App'x at 974.

¹⁴⁶ *Id.*

District adopted the magistrate judge's recommendation and confirmed the sanctions imposed upon INPROTSA based on the inherent authority of courts to sanction parties who pursue "frivolous challenges to arbitration awards in the court system."¹⁴⁷

On appeal to the Eleventh Circuit, INPROTSA argued that the district court lacked subject-matter jurisdiction over the motion to vacate the arbitration award and that the lower court had abused its discretion in awarding sanctions to Del Monte.¹⁴⁸ After disposing of INPROTSA's allegation pertaining to lack of subject-matter jurisdiction,¹⁴⁹ the Eleventh Circuit, relying on *Hercules Steel*¹⁵⁰ and stating 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," held that the district court had not abused its discretion in awarding sanctions to Del Monte, making no mention whatsoever of the ground for vacatur that it considered non-existent.¹⁵¹

The ground for vacatur at issue, although missing from the Eleventh Circuit's opinion, was centered on INPROTSA's allegation that "the tribunal panel exceeded its powers by reaching an interpretation of the contract that was 'not rationally derived from the parties' agreement' and was 'completely irrational.'"¹⁵² INPROTSA's original vacatur petition also alleged that the panel had ignored "Florida law applicable to restrictive covenants and damages; and that it denied [INPROTSA] of due process by failing to give weight to [its] defenses and evidence, specifically, a written statement of a witness who was not subjected to cross-examination."¹⁵³

Subsequently, INPROTSA filed a certiorari petition to the United States Supreme Court, asking the Court to settle the circuit split over "whether the New York Convention's defenses to confirmation provide the exclusive grounds for vacating a New York

¹⁴⁷ *Id.* at 973–74.

¹⁴⁸ *Id.* at 974.

¹⁴⁹ *Id.*

¹⁵⁰ *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913–14 (11th Cir. 2006).

¹⁵¹ *INPROTSA 2019*, 783 F. App'x at 974 (internal quotations omitted).

¹⁵² *INPROTSA 2018*, No. 16-24275-CV, 2018 U.S. Dist. LEXIS 152115, at *3 (S.D. Fla. Sept. 4, 2018).

¹⁵³ *Id.*

Convention award.”¹⁵⁴ In October 2019, however, the Supreme Court denied certiorari.¹⁵⁵ As a result, *Industrial Risk* remains settled law in the Eleventh Circuit, meaning that petitions seeking to annul or vacate international arbitration awards are analyzed under the grounds for denying enforcement set forth in the New York Convention, rather than the grounds for vacatur established in the FAA.

VI. PRACTICAL CONSEQUENCES OF *INDUSTRIAL RISK* AND ITS PROGENY

The Eleventh Circuit’s rule emerging from *Industrial Risk* probably raises little-to-no concerns to the international audience, at least from the standpoint of available grounds for annulment. As mentioned before, most jurisdictions have adopted the Model Law,¹⁵⁶ meaning that the grounds for vacatur are identical to the grounds for opposing enforcement of an arbitral award.¹⁵⁷

In the United States, however, the Eleventh Circuit’s decision in *Industrial Risk* can have significant consequences, as exemplified in the *INPROTSA* case. *Industrial Risk* limits the right of parties to challenge non-domestic arbitration awards by denying a party the right to raise grounds for vacatur under the law of the arbitral seat, including the grounds for vacatur under the FAA.¹⁵⁸ Further, *Industrial Risk* not only eliminates the grounds for vacatur under Chapter One of the FAA, but it also prevents parties from asserting implied or non-statutory grounds for vacatur such as “manifest disregard of the law” and “arbitrary and capricious,” among others.¹⁵⁹

Additionally, *Industrial Risk* evidences a lack of understanding by the Eleventh Circuit of the operative federal arbitration

¹⁵⁴ Petition for a Writ of Certiorari at 15, *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int’l GmbH*, 2019 WL 3380417, at *15 (U.S. July 25, 2019) (No. 19-117).

¹⁵⁵ *Inversiones y Procesadoa Tropical INPROTSA, S.A. v. Del Monte Int’l GmbH*, 140 S. Ct. 124 (2019).

¹⁵⁶ See *supra* Part III.A.

¹⁵⁷ Compare UNCITRAL MODEL LAW, *supra* note 44, art. 34, with New York Convention, *supra* note 13, art. V.

¹⁵⁸ *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443, 1445–46 (11th Cir. 1998).

¹⁵⁹ See THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 317–18 (4th ed. 2004).

framework and the subsequent interplay that exists—or should exist—between Chapters One and Two of the FAA. Such erroneous interpretation negates the intent of the framers of the Convention not to bind themselves to exclusive grounds for annulment and renders the residual clause of the FAA meaningless.¹⁶⁰

Finally, another important—and often overlooked—consequence of *Industrial Risk* affects the Panama Convention, incorporated in Chapter 3 of the FAA.¹⁶¹ The Panama Convention is considered as part of “the supreme law of the land” by virtue of the Supremacy Clause found in Article VI of the Constitution.¹⁶² The former, which is also applicable to non-domestic arbitral awards, also contains grounds for denying enforcement just as the New York Convention.¹⁶³ Yet, the Eleventh Circuit in *Industrial Risk* categorically stated that an appeal of an arbitral motion must be denied unless an appellant “can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention.”¹⁶⁴ Taking the Eleventh Circuit’s rationale at face value, it then should follow that the Panama Convention provides the grounds for annulment in cases where the Panama Convention applies. While it is true that the grounds for annulment listed in both Conventions are identical, the result is the same: the Eleventh Circuit, through *Industrial Risk*, explicitly ignored and negated the full force and effect of the Panama Convention, a treaty placed on equal footing with the New York Convention and which also constitutes “the supreme law of the land.”¹⁶⁵

As a result, the Eleventh Circuit remains an outlier amongst the Circuit Courts in the United States. While most of the country’s Circuit Courts have determined that federal arbitration law can be applied to vacate non-domestic awards, the Eleventh Circuit stands

¹⁶⁰ See *Samra*, *supra* note 40, at 379.

¹⁶¹ Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1483 U.N.T.S. 249; 9 U.S.C. §§ 301–07 (2018).

¹⁶² U.S. CONST. art. VI.

¹⁶³ Inter-American Convention on International Commercial Arbitration, *supra* note 161, art. 5.

¹⁶⁴ *Indus. Risk Insurers v. M.A.N. Guttehoffnungshütte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998).

¹⁶⁵ U.S. CONST. art. VI.

alone affirming that no defense or ground for vacatur exists outside the New York Convention.¹⁶⁶

¹⁶⁶ Caroline Simson, *Top 5 International Arbitration Decisions of 2019*, LAW360 (Dec. 20, 2019, 6:48 PM), <https://www.law360.com/articles/1223746/top-5-international-arbitration-decisions-of-2019>.