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## Preface: International Commercial Arbitration in the United States Court of Appeals for the Eleventh Circuit

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# Preface: International Commercial Arbitration in the United States Court of Appeals for the Eleventh Circuit

JOHN H. ROONEY, JR. & SANDRA FRIEDRICH\*

The following three articles, each co-authored by a Miami attorney who practices in the area of international arbitration and a recent graduate of the White & Case International Arbitration LL.M. Program at the University of Miami School of Law, highlight recent important decisions of panels of the United States Court of Appeals for the Eleventh Circuit in the area. One article considers the treatment of the pathological arbitration clause, another the intersection of the New York Convention and the unique regulatory structure for business of insurance in the United States, and the third the standard for the vacatur of awards not considered to be domestic.

The idea for these articles on arbitration in the Eleventh Circuit came from a book that Professor Michael Reisman gave me when we sat together on an International Centre for Settlement of Investment Disputes (“ICSID”) panel, *The Reasons Requirement in International Arbitration: Critical Case Studies*.<sup>1</sup> The book arose

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<sup>1</sup> THE REASONS REQUIREMENT IN INTERNATIONAL ARBITRATION: CRITICAL CASE STUDIES (Guillermo Aguilar Alvarez & W. Michael Reisman eds., 2008).

out of a seminar on international investment law that the editors taught at the Yale Law School.<sup>2</sup> After reading the book, it occurred to me that the concept might also work for papers written by students in my seminar on international commercial arbitration that I conduct at the University of Miami School of Law. Miami Law's International Arbitration Institute took up the task of working with some of the student works with the goal of publication.

Issues of federal jurisdiction and the effect of judicial decisions on the resolution of subsequent disputes are inherently complex. The complexity increases with the introduction of instruments of public international law to which the United States is a party. By way of introduction and to provide context for readers who are not familiar with the regulatory structure in the United States, we have provided the following general description of that structure.

The United States is a contracting party of two international conventions that regulate international commercial arbitration: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>3</sup> (commonly known as the New York Convention) and the Inter-American Convention on International Commercial Arbitration<sup>4</sup> (commonly known as the Inter-American Convention or the Panama Convention). The incorporating legislation for the New York Convention is codified at Chapter 2 of Title 9 of the United States Code.<sup>5</sup> The incorporating legislation for the Panama Convention is codified at Chapter 3 of Title 9 of the United States Code.<sup>6</sup> Title 9 of the United States Code, titled "Arbitration," is comprised of three chapters.<sup>7</sup> The first chapter has its origin in the

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<sup>2</sup> Guillermo Aguilar Alvarez & W. Michael Reisman, *How Well Are Investment Awards Reasoned?*, in *THE REASONS REQUIREMENT IN INTERNATIONAL ARBITRATION: CRITICAL CASE STUDIES* 1, 1 (2008).

<sup>3</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 4739 [hereinafter New York Convention].

<sup>4</sup> See Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. TREATY DOC. No. 97-12, 1438 U.N.T.S. 24384 [hereinafter Panama Convention].

<sup>5</sup> See 9 U.S.C. §§ 201–08 (2018).

<sup>6</sup> See *id.* §§ 301–07.

<sup>7</sup> *Id.* §§ 1–307.

United States Federal Arbitration Act (“FAA”), which entered into effect on January 1, 1926.<sup>8</sup>

Until the enactment of Chapter 2 of Title 9, Chapter 1 regulated all arbitrations—international and domestic—enforced in the United States.<sup>9</sup> Since both the New York Convention and the Panama Convention apply on a reciprocal basis (the award must have been made in another contracting state of the applicable convention)<sup>10</sup>, where the award is made in a state that is not a contracting state of either convention, the possibility exists that a foreign arbitral award might be regulated under Chapter 1. However, given the almost universal acceptance of the New York Convention by the community of nations,<sup>11</sup> it is improbable that an arbitral award presented for confirmation in a United States Court, or a request for execution of an agreement to arbitrate would not originate in either the United States or in a contracting state of the New York Convention.

Where a dispute arises that requires judicial resolution and that satisfies the requirements for application of one of the conventions, both federal and state courts have jurisdiction to resolve the dispute.<sup>12</sup> As noted above, the dispute may present a federal question,

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<sup>8</sup> See Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16).

<sup>9</sup> See Alexander Sevan Bedrosyan, *The Limitations of Tradition: How Modern Choice of Law Doctrine Can Help Courts Resolve Conflicts Within the New York Convention and the Federal Arbitration Act*, 164 U. PA. L. REV. 207, 217 n.44 (2015).

<sup>10</sup> H. Bruce Dorsey & Martin Schreiber, *Legislation, Developments in Maryland Law, 1989–90*, 50 MD. L. REV. 1230, 1235–36 (1991).

<sup>11</sup> See James Christopher Gracey, Note, *Thou Shalt Not Steele: Reexamining the Extraterritorial Reach of the Lanham Act*, 21 VAND. J. ENT. & TECH. L. 823, 855 (2019) (noting that, at time of publication “[t]he New York Convention has near-universal acceptance with 159 states party and twenty-four signatories, with Sudan being the most recent accession in 2018”).

<sup>12</sup> 9 U.S.C. §§ 204, 302 (providing that actions under Sections 2 and 3 “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”).

and if the dispute is first brought in state court, there are liberal provisions for transfer to federal court.<sup>13</sup>

In addition to the FAA as well as New York and Panama Conventions, individual state legislators in the United States have adopted their own laws on domestic and international arbitration. The majority of states have implemented the Uniform Law Commission's ("ULC") Uniform Arbitration Act ("UAA") of 1956<sup>14</sup> or the Revised Uniform Arbitration Act ("RUAA") of 2000,<sup>15</sup> which apply to arbitration without distinguishing between domestic and international proceedings.<sup>16</sup> Eight states have implemented the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("UNCITRAL Model Law"),<sup>17</sup> while others, most notably New York, have enacted *sui generis* statutory provisions on arbitration.<sup>18</sup>

The three states within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit—Alabama, Georgia, and Florida—serve to illustrate this plurality of approaches to arbitration legislation at the state level.

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<sup>13</sup> See *id.* §§ 205 (allowing actions related to an agreement or award subject to New York Convention to be removed to federal district court at any time before trial, and stating that the ground for removal need not appear on the complaint's face); 302 (incorporating § 205 by reference as applicable to any actions related to an agreement or award subject to Panama Convention).

<sup>14</sup> Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677, 690 (2017) ("The Uniform Law Commission has even gone so far as to approve several uniform acts that have since been adopted by a majority of states, including the Uniform Arbitration Act.").

<sup>15</sup> *Id.* at 690 n.52 (noting that the revised version of the Uniform Arbitration Act has been adopted by 49 states).

<sup>16</sup> See UNIF. ARBITRATION ACT, Prefatory Note (Unif. Law Comm'n 1955) (amended 1956) (noting that UAA "covers voluntary written agreements to arbitrate," without distinguishing between domestic and international agreements); REV. UNIF. ARBITRATION ACT, Prefatory Note (Unif. Law Comm'n 2000) (noting that RUAA does not specifically address subject of international arbitration).

<sup>17</sup> See U.N. Comm'n Int'l Trade Law, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), With Amendments as Adopted in 2006*, UNITED NATIONS, [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status).

<sup>18</sup> See N.Y. C.P.L.R. 7501 (Consol. 2019) (governing controversies in New York state courts related to arbitration agreements and enforcements).

Florida's International Commercial Arbitration Act came into effect in 2010 and is based on the UNCITRAL Model Law as amended in 2006.<sup>19</sup> Notable changes to the UNCITRAL Model Law include the following:

- Assistance to and supervision of arbitration shall be performed by the circuit court in the county in which the seat of the arbitration is located.<sup>20</sup>
- Florida's International Commercial Arbitration Act does not contain a requirement that an arbitration agreement shall be in writing, as it adopts the second option of the definition of an arbitration agreement under the 2006 UNCITRAL Model Law.<sup>21</sup>
- Arbitrators have judicial immunity in the same manner and to the same extent as judges.<sup>22</sup>
- The institution of arbitration proceedings in Florida, or consenting to arbitration in Florida, constitutes consent to personal jurisdiction of the Florida courts in actions arising out of or in connection with the arbitration.<sup>23</sup>

Florida also adopted pro-arbitration bar rules, allowing non-Florida attorneys to participate in international arbitration proceedings seated in the state.<sup>24</sup> Moreover, in 2013, Florida established

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<sup>19</sup> Compare U.N. COMM'N INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Docs. A/40/17, annex I; A/61/17, annex I, U.N. Sales No. E.08.V.4 (1985) (amended 2006), with FLA. STAT. §§ 684.0001–.0048 (2018).

<sup>20</sup> FLA. STAT. § 684.0008.

<sup>21</sup> *Id.*; U.N. COMM'N INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Docs. A/40/17, annex I; A/61/17, annex I, U.N. Sales No. E.08.V.4 (1985) (amended 2006).

<sup>22</sup> FLA. STAT. § 684.0045.

<sup>23</sup> *Id.* § 684.0049 (2018).

<sup>24</sup> See R. REGULATING FLA. BAR 1-3.11 (2020) (“A lawyer currently eligible to practice law in another United States jurisdiction or a non-United States juris-

the Miami International Commercial Arbitration Court as a subsection of the Complex Business Litigation Section of the Florida Eleventh Judicial Circuit to exclusively handle international commercial arbitration matters under the Florida International Commercial Arbitration Act.<sup>25</sup>

Following in Florida's footsteps, Georgia's International Commercial Arbitration Code came into effect in 2012 and also is based largely on the UNCITRAL Model Law as amended in 2006.<sup>26</sup> Notable changes to the UNCITRAL Model Law are listed below:

- Streamlined applications for interim relief.<sup>27</sup>
- Parties may choose any superior court in the State of Georgia to provide assistance and supervision in aid of arbitration.<sup>28</sup>
- Non-Georgia parties may opt out of certain grounds for setting aside of an arbitration award.<sup>29</sup>
- Consolidation of multiple arbitral proceedings upon the agreement of the parties.<sup>30</sup>

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diction may appear in an arbitration proceeding in this jurisdiction if the appearance is: (1) for a client who resides in or has an office in the lawyer's home state; or (2) where the appearance arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; and (3) the appearance is not one that requires pro hac vice admission.").

<sup>25</sup> See Media Advisory, 11th Judicial Circuit of Florida, Eleventh Judicial Circuit Establishes International Commercial Court, Media Advisory (Dec. 17, 2013), <https://www.jud11.flcourts.org/documents/NewsReleases/International%20Arbitration%20Court%20Announcement%20-%20Dec%202013.pdf>.

<sup>26</sup> Compare U.N. COMM'N INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Docs. A/40/17, annex I; A/61/17, annex I, U.N. Sales No. E.08.V.4 (1985) (amended 2006), with GA. CODE ANN. § 9-9-1 to -59 (2019).

<sup>27</sup> GA. CODE ANN. § 9-9-38.

<sup>28</sup> *Id.* § 9-9-27.

<sup>29</sup> *Id.* § 9-9-56(e).

<sup>30</sup> *Id.* § 9-9-46.

- Enhanced subpoena powers allowing arbitrators to assist in the taking of evidence without the need for court intervention.<sup>31</sup>
- Arbitral immunity for arbitration tribunal as well as employees and agents of the arbitrator or any arbitral institution.<sup>32</sup>

Georgia has also promulgated pro-arbitration bar rules allowing parties to select counsel and arbitrators of their choice in arbitral proceedings seated in Georgia, even if these lawyers are not licensed to practice law in that state or any other U.S. jurisdiction.<sup>33</sup> Moreover, under the Georgia Uniform Superior Court Rules, non-U.S. lawyers may represent their clients on a *pro hac vice* basis in Georgia courts in judicial proceedings ancillary to international arbitration.<sup>34</sup> In 2015, Georgia also designated a specialized court—now known as the Metro Atlanta Business Case Division—to hear and resolve legal issues arising out of international commercial arbitration.<sup>35</sup>

Conversely, in Alabama, two separate instruments govern arbitration proceedings: the Alabama Arbitration Act codified in Alabama Code Sections 6-6-1 to 6-6-16,<sup>36</sup> and the Alabama Rules of Civil Procedure 71B and 71C.<sup>37</sup> Neither is based on the UAA,

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<sup>31</sup> *Id.* § 9-9-49.

<sup>32</sup> *Id.* § 9-9-32(f)–(g).

<sup>33</sup> See GA. R. PROF. CONDUCT 5.5(e)(3) (2018) (“[A] Foreign Lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the Foreign Lawyer performs services in this jurisdiction that . . . are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceedings held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer’s practice in a jurisdiction in which the Foreign Lawyer is admitted to practice.”).

<sup>34</sup> Georgia Superior Court Rule 4.4 (“Admission Pro Hac Vice”).

<sup>35</sup> Atlanta Judicial Circuit Rule 1004(4)(a)(viii) (as amended on July 14, 2016 by order of the Supreme Court of Georgia); see also Media Release, Superior Court of Fulton County, Superior Court of Fulton County’s Business Court Division is Now Home to International Commercial Arbitration (June 17, 2017), <https://www.fultoncourt.org/business/N-InternationalArbitration.pdf>.

<sup>36</sup> ALA. CODE §§ 6-6-1 to -16 (2020).

<sup>37</sup> ALA. R. CIV. P. 71B, 71C (2020).



RUAA or UNCITRAL Model Law.<sup>38</sup> Notable provisions of the Alabama Arbitration Act include the following:

- Alabama law prohibits specific performance of arbitration agreements.<sup>39</sup>
- The Alabama Arbitration Act does not provide for confirmation of arbitral awards, but rather deems an award to have the effect of a judgment automatically.<sup>40</sup>
- The Alabama Arbitration Act does not provide for enforcement of interim awards.<sup>41</sup>

However, in the United States, a court will not apply a provision of state law that conflicts with federal law.<sup>42</sup> Under the Supremacy Clause of the U.S. Constitution, the “Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”<sup>43</sup> Thus, courts apply the FAA and the New York and Panama Conventions as well as the underlying pro-arbitration bias, irrespective of the law governing the contract containing the arbitration provision.<sup>44</sup>

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<sup>38</sup> Compare U.N. COMM’N INT’L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Docs. A/40/17, annex I; A/61/17, annex I, U.N. Sales No. E.08.V.4 (1985) (amended 2006), *with* ALA. CODE §§ 6-6-1 to -16, and ALA. R. CIV. P. 71B, 71C.

<sup>39</sup> ALA. CODE § 8-1-41(3) (2020). This provision only applies to arbitration agreements that involve a purely intrastate transaction not implicating interstate commerce and the FAA. *Custom Performance, Inc. v. Dawson*, 57 So. 3d 90, 95 (Ala. 2010); *Central Res. Life Ins. v. Fox*, 869 So. 2d 1124, 1127 (Ala. 2003).

<sup>40</sup> ALA. CODE §§ 6-6-2, -12; ALA. R. CIV. P. 71C.

<sup>41</sup> *Wright v. Land Developers Const. Co.*, 554 So. 2d 1000, 1002 (Ala. 1989).

<sup>42</sup> *Arizona v. U.S.*, 567 U.S. 387, 399 (2012).

<sup>43</sup> U.S. CONST. art. VI, § 2.

<sup>44</sup> *See, e.g., CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012); *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011); *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984).

Consequently, even though the FAA does not occupy the entire field of arbitration,<sup>45</sup> it preempts certain aspects of state law. For example, Sections 1 and 2 of the FAA have been held to have established federal substantive principles of arbitrability, which are applicable in state and federal court.<sup>46</sup> State law may apply to ancillary matters of the arbitral process, such as consolidation of claims or arbitrator immunity, which the FAA does not address, as long as the state law provisions are not incompatible with the FAA's overall purpose.<sup>47</sup> To illustrate, courts have consistently said that federal arbitration legislation is the product of pro-arbitration bias.<sup>48</sup> If an otherwise applicable provision of state law is inconsistent with this bias, the provision likewise will not be applied.<sup>49</sup> Moreover, a state's arbitration law also may apply where the parties expressly choose it to govern the arbitral proceedings; however, a general choice-of-law provision not specific to issues of arbitration usually is insufficient to displace the FAA.<sup>50</sup>

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<sup>45</sup> *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1321–22 (11th Cir. 2010).

<sup>46</sup> *See, e.g., Southland Corp.*, 465 U.S. at 11.

<sup>47</sup> *See, e.g., AT&T Mobility LLC*, 563 U.S. at 343; *Preston v. Ferrer*, 552 U.S. 346, 362–63 (2008); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland Corp.*, 465 U.S. at 16; *see also* GARY BORN & PETER RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 1163 (5th ed. 2011); REV. UNIF. ARBITRATION ACT, Prefatory Note (Unif. Law Comm'n 2000).

<sup>48</sup> *See, e.g., CompuCredit Corp.*, 565 U.S. at 98; *KPMG LLP*, 565 U.S. at 21; *AT&T Mobility LLC*, 563 U.S. at 339; *Southland Corp.*, 465 U.S. at 10; *S. Comm. Servs., Inc. v. Thomas*, 720 F.3d 1352, 1358 (11th Cir. 2013); *Frazier*, 604 F.3d at 1321; *Davis v. Prudential Sec., Inc.* 59 F.3d 1186, 1192 (11th Cir. 1995).

<sup>49</sup> *See, e.g., Southland Corp.*, 465 U.S. at 16 (holding that California statute that frustrated FAA's purpose violated Supremacy Clause); *Frazier*, 604 F.3d at 1321–22 (finding plaintiff's state-law claim foreclosed by decision on the same in arbitration); *Davis*, 59 F.3d at 1188, 1193 (holding that New York law barring punitive damage awards did not apply and affirming arbitrators' punitive damage award).

<sup>50</sup> *See, e.g., Preston v. Ferrer*, 552 U.S. 346, 362–64 (2008) (applying California law selected in parties' contract); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61–64 (1995). Lower federal courts have followed this approach. *See, e.g., Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269–70 (9th Cir. 2002) ("Parties may agree to state law rules for arbitration even if such rules are inconsistent with those set forth in the Federal Arbitration Act . . . . However, parties must clearly evidence their intent to be bound by such rules."). *But see Sakkab v. Lucottice Retail N.A., Inc.*, 803 F.3d 425, 431 (9th Cir. 2015)

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(holding that the FAA does not preempt state law rules that apply generally to contracts). *See also* *Olsher Metals Corp. v. Olsher*, No. 03-12184, 2004 WL 5394012, at \*2–3 (11th Cir. Jan. 26, 2004) (agreeing with the district court that federal law—not Italian law chosen by the parties to govern a contract—will apply in interpreting the arbitration clause); *Davis*, 59 F.3d at 1189 (refusing to apply New York law prohibiting award of punitive damages).