



2024 Year in Review: Significant Decisions in U.S. Federal Courts Involving International Arbitration

By Sarah Biser

"It is an honour to introduce this excellent article by my esteemed friend and colleague, Sarah Biser. The article provides an insightful review of significant U.S. federal court decisions in 2024, highlighting key issues that impact international arbitration, including discovery in foreign proceedings, enforcement of investor-state arbitral awards, and the complex interplay between contractual arbitration clauses.

In an evolving global arbitration landscape, adaptability and responsiveness to emerging legal and procedural challenges are essential. The Israeli Institute for Commercial Arbitration (IICA) remains committed to fostering excellence in dispute resolution, both domestically and internationally. As part of this commitment, the IICA plays a key role in positioning Tel Aviv as a premier center for international arbitration, offering a neutral, efficient, and business-oriented forum for cross-border dispute resolution. These developments highlight the growing need for a sophisticated and predictable legal framework in arbitration—an objective that the IICA actively promotes in Israel and beyond.

Recent legal trends reflect the ongoing dialogue between national courts and arbitral tribunals, shaping the enforceability and procedural contours of arbitration. While the challenges faced in U.S. courts provide valuable guidance, they also reinforce the necessity of strong arbitral institutions capable of addressing jurisdictional and procedural complexities. The IICA is uniquely positioned to support parties seeking effective and impartial dispute resolution in the region, leveraging its expertise and commitment to international best practices.

As the arbitration community navigates these legal shifts, it must remain steadfast in ensuring that arbitration continues to be an effective, enforceable, and trusted mechanism for dispute resolution. This review serves as a valuable resource for practitioners and scholars alike, offering key insights into the

Federal courts in the United States issued important decisions in 2024 on several key issues involving international arbitration:

1. Obtaining Discovery in Federal Courts for Use in Foreign Proceedings

One of the issues federal courts addressed in 2024 was whether parties in international arbitrations before

different types of arbitral panels can obtain discovery in U.S. federal courts in the wake of a U.S. Supreme Court ruling in 2022 limiting the availability of such discovery.

Under a U.S. statute, Section 1782(a) of Title 28, federal district courts may order discovery "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before for-



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mal accusation.” In the ZF Automotive case in 2022, the Supreme Court ruled that only a “governmental or intergovernmental adjudicative body” constitutes a “foreign or international tribunal” under Section 1782(a).¹ ZF Automotive involved an arbitration conducted before an arbitration panel constituted under the Arbitration Rules of the United National Commission on International Trade Law (“UNCITRAL”), which the Court ruled was not a governmental or intergovernmental adjudicative body. But the application to other types of international arbitration panels remained unclear.

In *Webuild S.P.A. v. WSP USA Inc.*, the United States Court of Appeals for the Second Circuit ruled that an arbitration panel constituted under the auspices of the International Centre for the Settlement of Investment Disputes (“ICSID”)—like the UNCITRAL panel in ZF Automotive—also was not a governmental or intergovernmental adjudicative body, and that parties to such arbitrations therefore cannot obtain discovery in U.S. federal courts for use in such arbitrations under Section 1782(a).²

ICSID, which was founded in 1966 by the World Bank and is supported by more than 160 member countries that have agreed to enforce and uphold arbitral awards in accordance with the ICSID Convention, is one of the leading international arbitration organizations. The Second Circuit’s ruling in *Webuild*, therefore, is likely to have an impact on a large number of international arbitrations.

Webuild S.P.A., the appellant in the case, argued that the ICSID arbitration panel that had ruled on *Webuild*’s

dispute with the Republic of Panama regarding the bidding and procurement processes for the third set of locks for the Panama Canal has more of the characteristics of a governmental adjudicative body than the UNCITRAL panel at issue in ZF Automotive, because of the extensive governmental involvement in the formation of ICSID and other factors. The Second Circuit ruled that *Webuild*’s argument conflated the ICSID Centre with the arbitration panel constituted under the ICSID Rules, which, the court ruled, remained a privately constituted panel that was not imbued with governmental authority.

In another case, *In re B&C KB Holding GmbH*, the Second Circuit addressed whether a party that was involved in both a foreign criminal investigation and an international arbitration before a panel that did not qualify as a governmental authority for purposes of Section 1782(a) could obtain discovery in U.S. courts under Section 1782(a).³ In that case, B&C, a private company based in Austria, filed a Section 1782 application seeking discovery for use in a pending criminal investigation in Austria related to a European-based company it had acquired. Shortly after filing its criminal complaint, B&C commenced arbitration proceedings against related entities before a panel of the German Arbitration Institute (“DIS”).

The Second Circuit ruled that, so long as the criminal investigation was not sham litigation or a ruse designed solely to obtain discovery in a non-governmental proceeding, B&C was allowed to obtain discovery in the U.S. under Section 1782 in connection with the criminal proceeding, and to also use the materials in connection with the arbitration, even though, under ZF Automotive, B&C

¹ *Smith v. Spizzirri*, 601 U.S. 471 (2024).

² *Forrest v. Spizzirri*, 2022 WL 2191931, at *1 (D. Ariz. June 17, 2022) (quoting *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014)).

³ *Forrest v. Spizzirri*, 62 F.4th 1201 (9th Cir. 2023).

could not have obtained discovery under Section 1782 solely in connection with the arbitration. The court also ruled that District Courts retained the power to exercise their discretion to restrict the use of such discovery, and affirmed the District Court's decision in this case to require prior approval from the Austrian public prosecutor before material obtained in discovery in the U.S. in connection with the criminal investigation could be used in the parallel arbitration.

2. Enforcement of Intra-EU Investor-State Arbitral Awards

The United States Court of Appeals for the D.C. Circuit weighed in on issues involving the enforceability in the United States of arbitration awards in disputes between companies doing business in Europe and countries that belong to the European Union ("EU"). The EU courts have ruled that such awards are invalid under EU law. As a result, companies have come to the United States to try to enforce such awards.

In *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, a decision consolidating three separate arbitrations, the D.C. Circuit ruled that U.S. courts have jurisdiction to consider the enforceability of such award, rejecting the Kingdom of Spain's argument that such jurisdiction was barred by sovereign immunity. But the court took no position on the ultimate enforceability of such awards (beyond holding that the district court had jurisdiction to decide the issue), and also struck down the district court's grant of a preliminary injunction that would have barred Spain

from seeking an anti-suit injunction in European courts to bar such a U.S. proceeding.

The arbitrations at issue in *NextEra* involved claims by Dutch and Luxembourgish energy companies that made investments in Spain in reliance on promised economic subsidies. Several years later, Spain withdrew the subsidies in the wake of the 2008 financial crisis. The companies brought arbitration proceedings against Spain under the Energy Charter Treaty, a multilateral investment treaty whose signatories include most countries within the EU, as well as some countries outside of Europe and the EU, but not the United States.

The companies prevailed in their arbitrations and secured multi-million euro awards against Spain. The companies were unable to enforce their awards in Europe, however, because the EU Court of Justice has ruled that awards in arbitration between a member state and companies of another member state are not enforceable under EU law, because the arbitration tribunals lack authority to refer questions of EU law to the Court of Justice.

Unable to enforce their awards in the EU, the companies sought to enforce them in the U.S., bringing confirmation proceedings in the District Court for the District of Columbia pursuant to the ICSID Convention and the New York Convention. Spain sought to dismiss the proceedings on the ground that they would violate Spain's sovereign immunity. Spain also filed its own lawsuits in Dutch and Luxembourgish courts seeking an anti-suit injunction to prevent the companies from proceeding with their petitions to enforce their arbitral awards in the United States.

On the sovereign immunity issue, the D.C. Circuit rejected Spain's argument, ruling that Spain had agreed to arbitration of such disputes under the Energy Charter Treaty, and that the arbitration exception to the Foreign Sovereign Immunities Act therefore applied. The court underscored, however, that it was not taking a position on whether the arbitration awards should in fact be enforced; it was ruling only that the district court had jurisdiction to decide the issue.

In addition, while the district court had granted an injunction to prevent Spain from seeking anti-suit relief in foreign courts, the D.C. Circuit reversed on that issue, ruling that the district court had abused its discretion

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in issuing such an injunction. Among other things, the court ruled that the district court did not address the fact that it was issuing an injunction against a foreign sovereign, which the court said was “virtually unprecedented.” While the court did not categorically foreclose anti-suit injunctions against foreign sovereigns, it ruled that it was not appropriate in the circumstances of these cases, where issues of EU law were involved.

3. Whether a Court or an Arbitrator Should Decide Whether a Dispute Is Subject to Arbitration Where the Parties Have Agreed to Two Contracts that Are in Conflict on the Issue

In a unanimous opinion issued in May 2024, the U.S. Supreme Court decided that a court, not an arbitrator, must decide whether a dispute is subject to arbitration when parties have agreed to two separate agreements that are in conflict as to whether a dispute between the parties is arbitrable.

The case involved Coinbase, Inc., which operates a cryptocurrency exchange platform, and certain users of the Coinbase platform. The parties executed two contracts.

The first contract, the Coinbase User Agreement, contained an arbitration provision with what is known as a “delegation clause”; under that provision, an arbitrator must decide all disputes under the contract, including whether a given disagreement is arbitrable. In addition, the Coinbase users submitted entries to a sweepstakes that Coinbase offered. In so doing, they agreed to the Official Rules of the sweepstakes—the second contract. Unlike the User Agreement, the Official Rules contained a forum selection clause providing that all disputes regarding the sweepstakes must be decided in California courts, either state or federal.

After the sweepstakes concluded, the Coinbase users filed a class action lawsuit against Coinbase in federal district court in California, alleging that the sweepstakes violated certain California laws. Coinbase moved to compel arbitration, arguing that the User Agreement and its delegation clause controlled. The district court denied the motion, ruling that the Official Rules forum selection clause controlled, not the User Agreement. The United States Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari

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to decide the following question: when two such contracts exist, who decides the arbitrability of a contract-related dispute between the parties—an arbitrator or the court?

The Supreme Court ruled that “basic legal principles” established the answer. It ruled that, because arbitration is a matter of contract and consent, a dispute is subject to arbitration only if the parties actually agreed to arbitrate the dispute. Before a delegation provision or a forum selection clause like the one at issue can be enforced, the Court ruled, a court needs to decide what the parties have agreed to—that is, which contract controls.

Coinbase argued that this approach would “invite chaos” by facilitating challenges to delegation clauses. The Court disagreed. It said that, in cases where parties have agreed to only one contract, and the contract contains an arbitration clause with a delegation provision, courts must send all arbitrability disputes to arbitration. But where, as in this case, the parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitration disputes to the courts—a court must decide which contract governs.

4. The U.S. Supreme Court Decides that Federal Courts Should Stay, Rather than Dismiss, Cases that Are Subject to Arbitration, If One Party Requests It

In May 2024, the U.S. Supreme Court decided an issue that has divided the federal courts of appeals. When the claims at issue in a federal court suit are subject to arbitration, does the court have authority to dismiss the ac-

tion, or can it only stay the action pending resolution of the arbitration? In *Smith v. Spizzirri*,^[1] the Court ruled unanimously that, under the Federal Arbitration Act (“FAA”), even when all of the claims in a federal court action are subject to arbitration, the court may only stay the action pending resolution of the arbitration and not dismiss it, if one of the parties requests a stay.

In *Smith*, the plaintiffs were current and former delivery drivers who sued their employer in state court in Arizona, alleging multiple violations of federal and state employment laws. After removing the case to federal court in Arizona, the defendants move to compel arbitration and dismiss the action, claiming that all of the plaintiffs’ claims were subject to mandatory arbitration.

While the plaintiffs conceded that their claims were arbitrable, they argued that the FAA required the court to stay the action pending arbitration, rather than to dismiss it. The district court granted the defendants’ motion to compel arbitration and dismissed the case, rather than staying it, citing Ninth Circuit precedent holding that “a district court may either stay the action or dismiss it outright when, as here, the court determines that all of the claims raised in the action are subject to arbitration.”^[2] On appeal, the Ninth Circuit affirmed.^[3] In an unusual concurrence, two of the judges on the three-member appellate panel encouraged the Supreme Court to consider the issue, noting that the circuits were split on the issue, and that the Ninth Circuit’s position seemed to conflict with the plain language of the FAA.

Section 3 of the FAA, 9 U.S.C. 3, provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Prior to the Supreme Court’s decision, six federal circuits—the Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits—had ruled that, un-

der this language, a federal district court may only stay, and not dismiss, an action in which the claims are subject to arbitration. Four circuits, however—the First, Fifth, Eighth, and Ninth Circuits—ruled that district courts have the discretion to dismiss, rather than stay, such an action.

The Supreme Court ruled that the “text, structure, and purpose” of the FAA “all point to the same conclusion: When a federal court finds that a dispute is subject to arbitration, and a party has requested a stay of the court proceeding pending arbitration, the court does not have discretion to dismiss the suit on the basis that all the claims are subject to arbitration.”

Pointing to the language of the statute, the Court noted that it used the words “shall . . . stay,” which, it said, leaves no room for a court to exercise discretion to dismiss, rather than stay, such an action. The Court disregarded that the statute refers to staying “the trial of the action,” rather than the action itself, which lower courts had found made the scope of the statutory mandate unclear.

The Court also reasoned that allowing a court to dismiss such an action would create an anomaly, because the FAA makes clear that orders compelling arbitration ordinarily are not immediately appealable, but an order dismissing an action in favor of arbitration would be immediately appealable.

The Court also said that staying rather than dismissing such an action “comports with the supervisory role that the FAA envisions for the courts.” For example, the FAA provides for courts to assist parties in arbitration by appointing an arbitrator, 9 U.S.C. § 5; to enforce subpoenas issued by arbitrators to compel testimony or produce evidence, 9 U.S.C. § 7; and to facilitate recovery on an arbitral award, 9 U.S.C. § 9. The Court also noted that district courts “can adopt practices to minimize any administrative burden caused by the stays that § 3 requires.”

The Court’s decision support the FAA’s goal of moving “parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible” and eliminates delays from appeals for parties resisting arbitration. As the Court noted, orders either granting a motion to compel arbitration or an order staying a case and compelling arbitration are not appealable. ■



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